

should remand the case and allow the circuit court to determine whether Washington voluntarily caused his conviction. We disagree. During oral arguments, the State indicated that it would not present new evidence or even participate in a new hearing. As the evidence in the record will not change by remanding to a lower court, we can satisfactorily rely on the current record. There are ample facts in the current record to determine that Washington did not voluntarily cause his conviction.

III. Conclusion

For the foregoing reasons, we conclude that Washington is entitled to a Certificate of Innocence under 735 ILCS 5/2-702. We reverse the judgments of the circuit and appellate court, and we remand to the circuit court with directions to grant Mr. Washington a Certificate of Innocence.

Applicant Details

First Name	Sophia
Middle Initial	M
Last Name	Marberry
Citizenship Status	U. S. Citizen
Email Address	smarberr@samford.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>2453 RIDGEMONT DR</div> <div>City</div> <div>HOOVER</div> <div>State/Territory</div> <div>Alabama</div> <div>Zip</div> <div>35244</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	4702924734

Applicant Education

BA/BS From	Kennesaw State University
Date of BA/BS	May 2021
JD/LLB From	Cumberland School of Law, Samford University
	http://cumberland.samford.edu/
Date of JD/LLB	May 1, 2024
Class Rank	50%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	No
----------------------------------	----

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Cockrell, John
John_Cockrell@fd.org
Woodham, Matt
mwoodham@samford.edu
Butler, Kevin
kevin_butler@fd.org
(205) 208-7170

This applicant has certified that all data entered in this profile and any application documents are true and correct.

S O P H I A M . M A R B E R R Y

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May 21, 2023

The Honorable Leslie Abrams Gardner
United States District Court, Middle District of Georgia
201 West Broad Avenue
Albany, Georgia 31701

Dear Judge Gardner:

I am a rising third-year student at Cumberland School of Law, expecting my degree in May 2024. I am writing to express my enthusiasm and interest in a 2024-2026 clerkship in your chambers. I believe my education and background make me an ideal candidate for this role, and I am confident that I could be an asset to your chambers. I also have personal connections in Georgia and desire to practice in the region long-term.

Enclosed please find my resume, unofficial law school transcript, undergraduate transcript, writing sample, and letters of recommendation from the following:

- Federal Public Defender Kevin Butler, Kevin_Butler@fd.org
- Assistant Federal Public Defender John Cockrell, John_Cockrell@fd.org
- Professor Matt Woodham, mwwoodham@samford.edu

While working at the Federal Public Defender's Office for the Northern District, I have gained insight into the federal justice system and have been exposed to various legal issues. For example, I have researched the relationship between the Federal Sentencing Guidelines and the commentary, and whether the commentary has controlling weight. I have also explored the effect asylum claims and necessity-based defenses could have on illegal reentry cases. This experience gives me a solid foundation to build upon as your clerk, as I have improved upon my drafting of motions and memoranda and have gained valuable insight shadowing attorneys in court.

More broadly, as a legal intern and extern, my supervisors have continuously recognized my diligence and attention to detail. I also have a strong academic background in research and legal writing, as demonstrated by my performance at Cumberland and in my previous internships at the Federal Public Defender's Office and the Jefferson County Public Defender's Office.

On a personal note, I have also been in recovery since October 2015, and since then, my life has continued to move in an upward trajectory. Recovery requires honesty, strength, resiliency, and hard work. These qualities will help me to excel as your clerk. As will my ability to learn quickly, work thoroughly, and act professionally.

This summer, I have secured employment at Jefferson County Public Defender's Office and, alongside retired Chief Justice Sue Bell Cobb, at Redemption Earned. Thank you for your time and consideration.

Sincerely,
Sophia Marberry
Sophia Marberry

S O P H I A M . M A R B E R R Y

2 4 5 3 R I D G E M O N T D R I V E • H O O V E R , A L A B A M A 3 5 2 4 4

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EDUCATION

Samford University, Cumberland School of Law, Birmingham, AL

Juris Doctor expected, May 2024

GPA: 3.08

Activities: Phi Alpha Delta, American Constitution Society, Cumberland Public Interest and Community Services, and Alabama Student Bar Association

Kennesaw State University, Kennesaw, Georgia

Bachelor of Science in Political Science (Minor: Criminal Justice) magna cum laude, May 2021

GPA: 3.71

Honors: President's List (4 semesters), Dean's List (3 semesters)

EXPERIENCE

Jefferson County Public Defender's Office

Intern / extern

Birmingham, AL
July - November 2022

- Collaborated with attorneys in representing indigent defendants in misdemeanor, juvenile, & felony cases
- Aided in the preparation of an NGRI defense for a client charged with attempted murder
- Interacted with clients currently participating in one of the Jefferson County Court's diversion programs, specifically Drug Court and Mental Health Court

Office of the Federal Public Defender's Office

Intern / extern

Birmingham, AL
June 2022 & present

- Attended various hearings, including initial appearances, change of plea, bond revocation, and final sentencing and visited with clients at the Talladega County Jail, Pickens County Jail, Hoover City Jail, and Cullman County Jail
- Drafted a motion to suppress all evidence seized and obtained by law enforcement officers because the investigatory stop was unlawful due to officers' lack of reasonable suspicion and drafted a motion to suppress all un-Mirandized custodial statements
- Ensured that there were no errors or discrepancies in the pre-sentence reports and helped identify if there were any mitigating factors to present to a judge before sentencing

J.M. Huber

Shadow Experience with the General Counsel

Atlanta, GA
2022

- Observed a quarterly regulatory council meeting and gained invaluable legal knowledge on a variety of topics including patent infringement, securities & regulations, employment law, and international trade
- Participated in Mine Safety Health Administration training at Marble Hill

Woodstock P.D. Ride-along Program

Participant

Woodstock, GA
2018, 2019

- Accompanied officers during their shifts to better understand their duties, objectives, goals, and experiences

SERVICE AND INTERNATIONAL MISSIONS

MUST Ministries

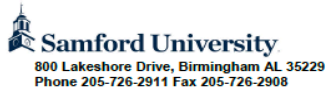
Volunteer

Smyrna, GA
2018

International Missions

Missionary

Haiti, Peru, Uganda
2009, 2010, 2011



**TRANSCRIPT OF ACADEMIC RECORD
OFFICIAL**

Record of: Sophia M Marberry
Level: Law

Issued To: SOPHIA MICHELLE MARBERRY

Date Issued: 03-JUN-2023
Date of Birth: 12-AUG
Student ID: 900298457
Student SSN: *****5889

Prior Degree: BS Kennesaw State University 2021-05-01 00:00:00

Course Level: Law

Primary Program

Juris Doctor

Program : Juris Doctor
College : Cumberland School of Law
Major : Law

Comments:

FIRST REGISTRATION DATE: 08/16/2021
6/6 Credits of Experiential Learning Satisfied
Law Writing Requirement Satisfied

SUBJ NO. COURSE TITLE CRED GRD PTS R

INSTITUTION CREDIT:

Fall 2021

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
LAW 502	Torts	4.00	B-	10.80	
LAW 506	Contracts I	3.00	B-	8.10	
LAW 508	Civil Procedure I	2.00	B-	5.40	
LAW 510	Criminal Law	3.00	B+	9.90	
LAW 512	Lawyering/Legal Reasoning I	3.00	B+	9.90	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 44.10 GPA: 2.94					

Spring 2022

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
LAW 505	Real Property	4.00	B-	10.80	
LAW 507	Contracts II	2.00	B+	6.60	
LAW 509	Civil Procedure II	3.00	B-	8.10	
LAW 513	Lawyering/Legal Reasoning II	3.00	A-	11.10	
LAW 524	Evidence	3.00	B+	9.90	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 46.50 GPA: 3.10					

Fall 2022

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
LAW 522	Constitutional Law I	2.00	C+	4.60	
LAW 526	Business Organizations	4.00	B	12.00	
LAW 799	AL Criminal Pract & Proc	3.00	A-	11.10	
LAW 800	Basic Skills in Trial Advocacy	3.00	B	9.00	
LAW 906	Externship I	1.00	A	4.00	
LAW 914	Govt Agency Externship I	2.00	P	0.00	
Ehrs: 15.00 GPA-Hrs: 13.00 QPts: 40.70 GPA: 3.13					

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO. COURSE TITLE CRED GRD PTS R

Institution Information continued:

Spring 2023

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
LAW 523	Constitutional Law II	3.00	B-	8.10	
LAW 546	Prof Responsibilities	2.00	B	6.00	
LAW 665	Criminal Procedure I	3.00	B	9.00	
LAW 712	Jury Selection	2.00	B+	6.60	
LAW 745	Bioethics and the Law	3.00	A	12.00	
LAW 915	Govt Agency Externship II	2.00	P	0.00	
Ehrs: 15.00 GPA-Hrs: 13.00 QPts: 41.70 GPA: 3.20					

Last Standing: Good Standing

Fall 2023

IN PROGRESS WORK

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
LAW 533	Secured Transactions	3.00	IN PROGRESS		
LAW 540	Wills, Trusts and Estates	3.00	IN PROGRESS		
LAW 613	Advanced Evidence	2.00	IN PROGRESS		
LAW 662	Domestic Relations	3.00	IN PROGRESS		
LAW 799	Health Care Fraud and Abuse	2.00	IN PROGRESS		
LAW 804	Advanced Skills/Trial Adv	3.00	IN PROGRESS		

In Progress Credits 16.00

***** TRANSCRIPT TOTALS *****

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	60.00	56.00	173.00	3.08

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL TRANSFER	0.00	0.00	0.00	0.00

	Earned Hrs	GPA Hrs	Points	GPA
OVERALL	60.00	56.00	173.00	3.08

***** END OF TRANSCRIPT *****

Jeremy Dixon, University Registrar

**OFFICE OF THE FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF ALABAMA**



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KEVIN L. BUTLER
Federal Public Defender

May 21, 2023

The Honorable Leslie Abrams Gardner
United States District Court, Middle District of Georgia
201 West Broad Avenue
Albany, Georgia 31701

RE: Sophia Marberry

Dear Judge Gardner,

I am writing to recommend Sophia Marberry for a term clerkship in your chambers. I have known Sophia since last Summer, and I have worked with her on several projects during her internships with my office. I have also had numerous conversations with her and served as a mentor of sorts. In that time, I have seen Sophia's work ethic and her commitment to the profession. Sophia's drive to learn, as well as her strong sense of ethics, would be assets to your chambers.

Because of the tremendous variety of cases in federal court, a judicial clerk must be well-rounded and able to assess cases involving a wide range of issues. I believe Sophia can learn new areas of law quickly. When I first met her, the first thing that I noticed about her was how inquisitive she was. It was clear that she was here to learn. A big part of her role in our office has been to do legal research. She has researched suppression issues, possible defenses to federal criminal charges, and immigration consequences of federal convictions, among others. Beyond just research, however, Sophia also asks many practical questions to understand how things work. I have found Sophia to be driven to absorb and learn everything she can, so she can be the most well-rounded lawyer that she can.

Sophia also has a strong sense of ethics. She once called me to ask my advice about an ethical dilemma. As we talked through this issue together, I was impressed by her willingness to make a principled stand and her independence of mind—two traits I hold in high regard. I also feel that Sophia’s recovery is an integral part of her story and her motivations. Many of our clients have substance-use disorders, and Sophia’s experiences drive her to help others going through similar things.

For these reasons, as well as Sophia’s personable nature, I believe she would be a welcome addition to your chambers. I hope that you will consider her for this opportunity.

Respectfully,



John F. Cockrell
Assistant Federal Public Defender



800 Lakeshore Drive
Birmingham, AL 35229
samford.edu
samford.edu/law

Matt Woodham
Assistant Professor of Law and Interim Director of Advocacy Programs
Cumberland School of Law

May 21, 2023

The Honorable Leslie Abrams Gardner
United States District Court, Middle District of Georgia
201 West Broad Avenue
Albany, Georgia 31701

Dear Judge Gardner:

I write to offer my unqualified recommendation of Sophia Marberry to serve as a clerk in your chambers. I was a criminal defense attorney for six years before joining the faculty at the Cumberland School of Law, where I teach Evidence, Basic Skills in Trial Advocacy, Alabama Criminal Practice and Procedure, and Criminal Law. Typically, I also serve as the Assistant Director of Trial Advocacy, though I am acting as the Interim Director of Advocacy Programs for the 2022-2023 academic year.

In her first year of law school, Ms. Marberry was a student in my Evidence class. Her work ethic and intellect were apparent from the first day of class. She was a regular participant in class and outside of it during my office hours. She also holds a unique place in my history as a professor as the first student to ask a question that truly stumped me. I will spare you the details of the evidentiary issue, but Ms. Marberry's question evidenced a curiosity, creativity, and intelligence that will serve her well as a lawyer.

In her second year of law school, Ms. Marberry elected to take two of my experiential courses: Basic Skills in Trial Advocacy and Alabama Criminal Practice and Procedure. In those courses, Ms. Marberry learned the legal principles at play at every stage of litigation. Ms. Marberry further put that knowledge to work in experiential simulations such as preliminary hearings, competency hearings, client counseling, trials, and sentencing hearings.

In each of those classes, Ms. Marberry excelled. In addition to her work ethic and intelligence, I believe her success is also thanks in large part to her possessing a striking drive and maturity. Some of my students appear to approach law school as merely a means of attaining a degree—and they seek out the easiest path to do so. Conversely, Ms. Marberry has always struck me as being deeply motivated to use her time in law school to truly learn the skills needed to be an effective advocate for others. This motivation will be an invaluable asset to her future clients and employers.

I hope you will consider Ms. Marberry for a position with the Court. I can say without hesitation that she would be a wonderful addition to your chambers.

Sincerely,

Matt Woodham

**OFFICE OF THE FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF ALABAMA**



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KEVIN L. BUTLER
Federal Public Defender

May 21, 2023

Honorable Leslie Abrams Gardner
United States District Court, Middle District of Georgia
201 West Broad Avenue
Albany, Georgia 31701

RECOMMENDATION FOR SOPHIA MARBERRY

Dear Judge Gardner:

I wholeheartedly recommend Sophia Marberry for a term clerkship with your chambers. Sophia's intellectual curiosity, proactive work ethic, and wonderful personality make her an outstanding addition to your staff.


Sophia spent six weeks with us as a summer intern, and she quickly distinguished herself. Because of her outstanding work and commitment to our office mission, she is the only intern we invited back as a spring intern. Sophia doesn't just complete the assignments given her. She thoroughly reviews all documents and information in each case she is working on. Therefore, her work product goes beyond addressing the single issue assigned. It encompasses and addresses how the issue may impact the overall litigation strategy. Because of her intellectual curiosity, thoroughness, and understanding of case strategy, Sophia quickly becomes an integral part of the case team.

Additionally, Sophia doesn't just wait for specific assignments from her intern supervisor or assigned attorney. She proactively monitors and reviews the cases that come into our office. As a result of her proactive nature, during attorney meetings, Sophia is able to provide beneficial input in all of our cases. Unlike most of our interns who wait for a specific assignment, Sophia identifies litigation issues, proposes litigation strategies and asks what she can do to further the team's goals.

Sophia is a joy to have in our office. She gets along well with everyone and has an optimistic attitude. Her enthusiasm for the office mission has a positive effect on those around her. She asks to accompany attorneys to any court hearings or client visits that her schedule will allow. She joins in impromptu case discussions as they break out in the office, and as a result she has become even more a part of those case teams.

In sum, Sophia has been a wonderful addition to our office. She is a bright and dedicated law student who takes great care in her work. She would be a superb addition to any office, including your chambers, and I recommend her with the highest confidence.

Sincerely,



Kevin L. Butler
Federal Public Defender
Northern District of Alabama

S O P H I A M . M A R B E R R Y

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WRITING SAMPLE 1

The attached writing sample is a legal memorandum I drafted as an assignment as an extern at the Federal Public Defender's Office for the Northern District of Alabama. Before writing this memorandum, I was informed that this client had been charged with two counts of felon in possession and one count of stealing a firearm related to an incident where he got into an altercation with a state trooper and took the trooper's gun. I was also told that this client had recently been evaluated and suffers from untreated PTSD related to a prior incident in which he was shot at by a different state trooper. Lastly, I was told that this client has indicated wanting to go to trial.

Based on the above, I was asked by one of the Assistant Federal Public Defenders to research (1) whether an insanity defense could be raised, (2) whether there was a justification/self-defense argument based on the client's PTSD causing him to perceive the situation in a way that made him believe he was in danger, even though objectively he was not, and (3) whether a diminished capacity defense based on his PTSD could be raised.

After researching these issues, I concluded that the only viable defense was an insanity defense. And after communicating this to the Assistant Federal Public Defender, I was asked to draft a memorandum specific to the insanity defense alongside any recommendations, etc. I performed all of the research, and this work is entirely my own. I am submitting the attached writing sample with the permission of the Federal Public Defender's Office. All identifying information has been redacted to protect client confidentiality.

WRITING SAMPLE 2

The attached writing sample is an excerpt of the Appellate Brief I drafted in my second semester Legal Research and Writing course. Due to the length of the original brief, the sample includes only the Argument section.

For purposes of this assignment, I argued on behalf of Nancy Johnson, the Plaintiff-Appellant. The purpose of the brief was to challenge the district court's summary judgment based on (1) its conclusion that the undisputed evidence established that Johnson's position was subject to the administrative exemption under the Fair Labor Standards Act and (2) its conclusion that Johnson's claim was barred by the two-year statute of limitations. I conducted all the research necessary for the assignment.

MEMORANDUM

To: [REDACTED]
From: Sophia Marberry
Re: [REDACTED] – insanity defense
Date: February 24, 2023

QUESTION PRESENTED

Under federal law, does [REDACTED] have an insanity defense based on his untreated PTSD stemming from a prior incident in 2008 where [REDACTED] was shot at by a state trooper, and his criminal conduct in 2019 that gave rise to the current charges, where he took and possessed a different state trooper's gun?

BRIEF ANSWER

It remains unclear as to whether the court would find that [REDACTED] untreated PTSD meets the test for insanity under 18 U.S.C. § 17(a). While PTSD has not been disqualified by federal courts as a sole basis for insanity, the defense has not been very successful at trial. In prior cases, most courts have rejected this specific defense when there was insufficient evidence to establish that the PTSD was directly connected to insanity. For this reason, I think the only way the court may find that there is sufficient evidence to satisfy the test for insanity under 18 U.S.C. § 17(a) would be if additional experts could provide a report with more compelling language that the courts look for (ex: "severe" PTSD) or if [REDACTED] is willing to amend her written report and oral testimony so that it satisfies [REDACTED] burden of proof by "clear and convincing evidence."

FACTS

[REDACTED] has been charged with two counts of possessing a firearm under 18 U.S.C. § 922(g)(1) and one count of possessing a stolen firearm under 18 U.S.C. § 922(j) arising from an incident where he took a state trooper's gun during an altercation. These offenses are alleged to

have occurred on or about November 19, 2021. For purposes of mitigation, [REDACTED] was evaluated by [REDACTED] [REDACTED] who qualifies as an “expert” under 5 U.S.C. § 3109. [REDACTED] performed a psychological evaluation on [REDACTED]. Based on this evaluation, [REDACTED] concluded that [REDACTED] suffers from untreated and unresolved PTSD caused by a prior incident where [REDACTED] was shot by a different state trooper.

DISCUSSION

Under federal law, Congress has defined the insanity defense as the following: “an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.” 18 U.S.C. § 17(a). The burden of proving insanity is on the defendant who must prove it by “clear and convincing evidence.” *United States v. Owens*, 854 F.2d 432, 434-35 (11th Cir. 1988).

While it’s unclear whether this court would recognize PTSD as a basis for the insanity defense, this memorandum summarizes cases in which federal courts have considered pretrial motions regarding the admission of expert testimony where PTSD was the sole basis for an insanity defense. This implies the availability of the defense based on PTSD in [REDACTED] case. For example, the federal district court in the District of Columbia has found that PTSD could qualify as the sole basis for an insanity defense. *U.S. v. Rezaq*, 918 F. Supp 463 (D.D.C. 1996). In that case, the defendant was charged with aircraft piracy, and the defense’s sole argument was that the defendant was suffering from PTSD at the time of the offense. There, the court denied the government’s motion to preclude the defendant from introducing law and expert testimony as evidence supporting the affirmative defense because that court found that the defense’s three

expert reports clearly indicated the defendant's diagnosis of PTSD and was sufficient to satisfy the insanity test set out in 18 U.S.C. § 17(a).

Specifically, in that case, the first expert reported that the defendant had a "severe case of PTSD and depression that 'seriously impaired' his ability to judge the wrongfulness of his conduct." *Rezaq* at 467. That expert also reported that "at the time of the hijacking, defendant's 'personality was fragmenting and the parts—perception, reason, judgment, contemplation of right and wrong, and assessment of consequences—were no longer fully [operative].'" *Id.* The second expert also concluded that the defendant "was unable to appreciate [the] wrongfulness of his conduct" and described their "mental state at the time of the hijacking as 'fragile, vulnerable, and unstable.'" *Id.* at 468. While the third expert also concluded that the defendant "was unable to appreciate the wrongfulness of his acts," the third expert did not describe the defendant's PTSD as severely as the other experts. *Id.* The court held that while the third expert did not describe the PTSD as being "severe," it did not preclude the possibility that the defendant could meet the insanity standard under 18 U.S.C. § 17(a) since the court considered the three records as a whole. *See id.*

In another case, the First Circuit held that the lower court's decision to exclude expert testimony was not improper when the only evidence supporting a defendant's insanity defense was a psychiatrist's report describing the defendant's PTSD as "significant" rather than "severe." *See United States v. Cartagena-Carrasquillo*, 70 F.3d 706, 712 (1st Cir. 1995). Additionally, the First Circuit concluded that while the psychiatrist's report accepted the defendant's statements that he was suffering from delusions, it failed to link the delusions with PTSD or with the incapacity to determine whether selling cocaine was wrong. *See id.* Similarly, the Eighth Circuit also addressed PTSD as the sole basis for an insanity defense. *See United States v. Long Crow*, 37 F.3d 1319 (8th

Cir. 1994). In *Long Crow*, the court determined that there was insufficient evidence to support giving insanity instructions when the only evidence was the defendant's own testimony and the testimony of an expert psychiatrist that did not evaluate the defendant "for the purpose of diagnosis." *Id.* at 1324. In its opinion, the *Long Crow* Court also explained that while it was unable to find any cases "that treated PTSD as a severe mental defect amounting to insanity," it did "not reject the possibility that PTSD could be a severe mental disorder in certain instances." *Id.* at 1324. And finally, though the defense was not based on PTSD, the Eleventh Circuit has held in a possession-of-a-firearm case that the defendant was entitled to have insanity instructions given to the jury when the expert testimony was that the defendant was "psychotic" and "would lose touch with reality." *United States v. Owens*, 854 F.2d 432, 436 (11th Cir. 1988).

Here, if [REDACTED] were to assert an insanity defense based on his untreated and unresolved PTSD, the burden would rest on [REDACTED] to prove by clear and convincing evidence that (1) his PTSD qualifies as a severe mental disease or defect, and (2) at the time of the offense, his PTSD caused insanity, which made him unable to appreciate the wrongfulness of grabbing the state trooper's gun. *See* 18 U.S.C. § 17; *see also Owens* at 434-35. This evidence can be established through expert testimony.

Currently, [REDACTED] report states that it is her opinion that "given the situational context of the attempted assault in 2008 and its similarities to the 2021 circumstances of the offense (e.g., the location, the race and position of the state trooper involved), [REDACTED] would have been at an increased risk to have interpreted his life as having been in danger during the 2021 offense." [REDACTED] Updated Mitigation Report] A court would likely find this testimony, by itself, insufficient to establish an insanity defense. *See Cartagena-Carrasquillo* at 712. For the court to find sufficient evidence in this case, there would likely need to be other expert testimony offered

in addition to [REDACTED] testimony — or [REDACTED] would need to be able to provide testimony of the following: (1) [REDACTED] PTSD is “severe”; (2) [REDACTED] was suffering from PTSD when the criminal conduct occurred; (3) there is a direct connection between [REDACTED] PTSD and the grabbing of the state trooper’s gun; and (4) because of his PTSD, [REDACTED] would not have been able to appreciate the wrongfulness of his actions as they were occurring. *See Rezaq* at 467. Even if [REDACTED] can provide this testimony, it still may be in [REDACTED] best interest to have at least one other expert witness that can offer a similar opinion to [REDACTED] because it will make [REDACTED] defense more compelling being the court will likely review the record and evidence as a whole. *See Rezaq* at 468.

CONCLUSION

While this defense has not been very successful at trial, I do think that [REDACTED] can meet the requirements for the insanity test under 18 U.S.C. § 17(a) if expert testimony can provide evidence that [REDACTED] PTSD is severe and that there is a direct connection between PTSD and insanity which caused him to not appreciate the wrongfulness of his actions at the time the offense was going on.

ARGUMENT

This Court should reverse the district court’s granting of summary judgment in favor of Alabama Auto for two reasons. First, summary judgment is not appropriate because there is a genuine issue of material fact since a reasonable jury could find that Johnson was not subject to the administrative exemption. Second, a jury could conclude that Alabama Auto’s violation was willful, and therefore Johnson’s FLSA claim was not barred by the two-year statute of limitations.

I. There was sufficient evidence for a reasonable jury to find that Johnson was not exempt from overtime pay under the FLSA.

This Court should reverse the district court’s ruling in favor of Alabama Auto because the district court erred as a matter of law in granting summary judgment because a genuine issue of material fact exists as to whether Johnson was employed in an administrative capacity. Under the FLSA, “no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation of time and a half.” 29 U.S.C. § 207(a)(1). The only time an employer is exempt from the FLSA’s overtime compensation requirement is when the worker has been “employed in a bona fide executive, administrative, or professional capacity.” *Id.* § 213(a)(1). There are three requirements an employee must meet to qualify for the administrative exemption under the FLSA. *See* 29 C.F.R. § 541.200. First, the employee must be “compensated on a salary or fee basis . . . of not less than \$684 per week.” *Id.* § 541.200(a)(1). Second, the employee’s

primary duty must be “office or non-manual work directly related to the management or general business operations of the employer.” *Id.* § 541.200(a)(2). Third, the employee’s primary duty must include “the exercise of discretion and independent judgment with respect to matters of significance.” *Id.* § 541.200(a)(3).

As explained below, the district court erred in granting summary judgment in favor of Alabama Auto as a matter of law. While both parties agree that Johnson was a salaried employee who made more than \$684 per week, there is a genuine dispute of material fact regarding whether Johnson satisfied the primary duty requirement and the discretion and independent judgment requirement to establish administrative exemption under the FLSA. *See id.* § 541.200.

A. A genuine dispute of material fact exists as to whether Johnson’s primary duties relate to Alabama Auto’s management or business operations.

Summary judgment was not appropriate because a genuine issue of material fact exists as to whether Johnson’s primary duties included office or nonmanual work directly related to Alabama Auto’s management or business operations. To qualify for an administrative exemption, an employee’s primary duty must include work directly related to their employer’s “management or general business operations.” *Id.* § 541.201(a). To satisfy the primary duty requirement, “an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing

production line or selling a product in a retail or service establishment.” *Id.* An employee’s exempt status cannot be established by “job title alone.” *Id.* § 541.2

Primary duty is “the principal, main, major or most important duty that the employee performs.” *Id.* § 541.700(a). Regulations provide a list of factors that should be considered when determining an employee's primary duty. *See id.* These factors include (1) the amount of time the employee spends performing exempt work; (2) the employee’s level of supervision; and (3) “the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.” *Id.* While an employee can qualify for administrative exemption without spending more than 50% of the time performing exempt administrative work, the time the employee spends “performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee.” *Id.* § 541.700(b). Even if an assistant manager of a retail establishment performs exempt duties, they will generally not be able to satisfy the primary duty requirement if they “are closely supervised and earn little more than the nonexempt employees.” *Id.* § 541.700(c).

Here, a genuine dispute of material fact exists as to whether Johnson’s primary duty as Assistant Manager required her to perform work directly related to “assisting with the running or servicing” of Alabama Auto. *See id.* § 541.201(a). There are several reasons a jury could conclude that Johnson’s primary duty was sales work.

See id. Johnson's work duties were similar to the duties performed by the sales technicians who did not hold an exempt position. (Doc. 25-4 at 2). Both the sales technicians and Johnson helped customers find products and checked customers out at the register. (*Id.*; Doc. 25-1 at 3). Johnson's frequent interaction with customers also raises a genuine question as to whether her primary duties were focused on the company's customers or its day-to-day operations. *See* 29 C.F.R. § 541.201(a).

Furthermore, there was no significant difference between Johnson's salary as Assistant Manager compared to the wages paid to other employees to do nonexempt work. *See id.* § 541.700(c). To illustrate, Johnson's salary was \$43,200 a year, or \$3,600 per month, whereas Samuel Taylor, a nonexempt sales technician at Alabama Auto, made \$37,000 a year, or \$3,000 a month. (Doc. 25-2 at 10; Doc. 24-5 at 4).

Johnson also spent more time performing non-exempt duties than exempt duties. *See* 29 C.F.R. § 541.700(b). Specifically, Johnson spent 60% of her time performing nonexempt sales-related work. (Doc. 25-1 at 3). While Johnson did sales work nearly every day, her administrative duties, like creating the work schedules and reviewing the timesheets, were done bi-weekly. (*Id.* at 7). Lastly, a genuine dispute exists regarding the amount of freedom Johnson had from supervision. *See* 29 C.F.R. § 541.700(b). All decisions were subject to the Store Manager's final review. (Doc. 25-3, ¶ 9). Based on the evidence and regulatory guidance, a reasonable jury could find that Johnson's primary duties did not directly relate to the

servicing or running of Alabama Auto. *See* 29 C.F.R. § 541.201(a). Because a reasonable jury could find that Johnson’s primary duty was sales, a genuine dispute of a material fact exists. For this reason, the district court erred in granting summary judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

B. There is a genuine dispute as to whether Johnson’s primary duties required her to exercise discretion and independent judgment concerning matters that were significant to Alabama Auto.

Summary judgment was not appropriate because a reasonable jury could find that Johnson did not exercise independent judgment and discretion. “To qualify for the administrative exemption, an employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. § 541.202(a). “[M]atters of significance refers to the level of importance or consequence of the work performed.” *Id.* Exercising discretion and independent judgment requires an employee to evaluate the “possible courses of conduct” and then act or reach a decision after considering “the various possibilities.” *Id.* To determine “whether an employee exercises discretion and independent judgment with respect to matters of significance,” the following factors are considered: (1) whether the employee could “formulate, affect, interpret, or implement management policies or operation practices;” (2) whether the work the employee performed affected the “business operations to a substantial degree;” (3) whether the employee could “waive or deviate from established policies and procedures without prior

approval;” and (4) whether the employee could commit their employer in matters that could have a “significant financial impact.” *Id.* § 541.202(b). To satisfy this requirement, an employee must be able to “make an independent choice, free from immediate discretion or supervision.” *Id.* § 541.202(c). Discretion does not include clerical work, secretarial work, or “recurrent or routine” work. *Id.* § 541.202(e).

Here, there is sufficient evidence for a reasonable jury to conclude that Johnson’s position did not satisfy the administrative exemption’s discretion and independent judgment requirement. *See id.* § 541.202(a). The record evidence suggests that Johnson could not make independent choices free from the Store Manager’s “immediate direction or supervision.” *Id.* § 541.202(c). For example, Johnson could not adjust the work schedule without the Store Manager’s approval. (Doc. 25-4 at 3). Similarly, while Johnson could recommend products and prepare purchase orders for the store, all purchase orders required the Store Manager’s final approval and signature. (Doc 25-1 at 6). This is important because it shows that Johnson lacked the authority to commit Alabama Auto in matters that had a significant financial impact. *See* 29 C.F.R. § 541.202(b). Company policy also required Johnson to report all customer problems and complaints to her Store Manager and any actions she planned to take to resolve them. (Doc. 25-3, ¶ 6). Johnson, therefore, could not “waive or deviate from established policies and procedures.” 29 C.F.R. § 541.202(b). Lastly, a jury could conclude that certain

duties that Johnson performed, like preparing purchase orders, setting work schedules, reviewing work orders, and reviewing employee timesheets, were clerical/secretarial duties that did not include the exercise of discretion. *See id.* § 541.202(e). Because there is a genuine dispute about whether Johnson’s primary duties required her to exercise discretion and independent judgment, summary judgment should not have been granted. *See Fed. R. Civ. P. 56(a).*

Because a reasonable jury could conclude that Johnson’s position did not qualify for the administrative exemption under the FLSA, Alabama Auto was not entitled to judgment as a matter of law. *See id.*

II. There was sufficient evidence for a reasonable jury to find that the two-year statute of limitations did not bar Johnson’s claim because Alabama Auto’s violation of the FLSA was willful.

The district court erred in granting Alabama Auto’s motion for summary judgment because a reasonable jury could find that Alabama Auto willfully violated the FLSA’s overtime pay requirement. While the general rule is that a cause of action under the FLSA “must be commenced within two years . . . a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.” 29 U.S.C. § 255(a). An employer willfully violates the FLSA if it “knew or showed a reckless disregard for the matter of whether its conduct was prohibited by the statute.” *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Reckless disregard is “the failure to make adequate inquiry into whether

conduct is in compliance with the Act.” *Alvarez Perez v. Sanford Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1163 (11th Cir. 2008). “[W]hen an employer’s actions squelch truthful reports of overtime worked or where the employer encourages artificially low reporting, it cannot disclaim knowledge.” *Allen*, 495 F.3d. at 1319.

Here, there is sufficient evidence for a jury to conclude that the two-year statute of limitations did not bar Johnson’s claim because Alabama Auto willfully violated the FLSA. In 2016, Alabama Auto asked its outside counsel to review five employee positions and classifications, one being Assistant Manager. (Doc. 25-2 at 5). The lawyer had more questions about the Assistant Manager position than any other position. (*Id.* at 6). Ultimately Alabama Auto was advised to minimize the sales work being performed by its assistant managers. (*Id.*). However, its only response was to have Claire Radford, its Human Resources Manager, pass the advice to the store managers. (*Id.* at 8). While Alabama Auto has agreed to produce documents relevant to the 2016 communication with outside counsel, it has yet to do so. (*Id.* at 6). Alabama Auto’s failure to provide this evidence raises a genuine issue of whether the store managers took the proper steps to minimize the sales work of their assistant managers. (*Id.*). While Johnson’s Store Manager recalls being told this advice, he admits that no changes were made to the amount of sales work Johnson was doing because she did great “in her sales position.” (Doc. 25-3, ¶ 7).

Lastly, there is evidence that Alabama Auto has generally discouraged

overtime and does its best to avoid it. *See Allen*, 495 F.3d. at 1319. Alabama Auto views overtime as unnecessary. (Doc. 25-2 at 9). The company's negative treatment of overtime has made it clear to employees that it is not acceptable to work over 40 hours and then attempt to claim overtime pay. (Doc. 25-1 at 8). The company's conduct resulted in employees at two different stores under-reporting their hours out of fear that their managers would take action against them. (Doc. 25-2 at 3).

Viewing the evidence in the light most favorable to Johnson, a jury could conclude from these facts that Alabama Auto willfully violated the FLSA by not inquiring into whether its actions complied with the FLSA. *See McLaughlin*, 486 U.S. at 133; *Alvarez*, 515 F.3d at 1163. Because a jury could find in Johnson's favor, the district court erred in granting summary judgment in favor of Alabama Auto.

Because both issues present a genuine dispute of material fact, Alabama Auto was not entitled to judgment as a matter of law. *See Fed. R. Civ. P 56(a)*.

Applicant Details

First Name **Clayton**
 Last Name **Marsh**
 Citizenship Status **U. S. Citizen**
 Email Address clayton.marsh@emory.edu
 Address

Address
Street
278 Somerlane Pl
City
Avondale Estates
State/Territory
Georgia
Zip
30002
Country
United States

Contact Phone Number **801-599-3289**

Applicant Education

BA/BS From **Utah State University**
 Date of BA/BS **May 2016**
 JD/LLB From **Emory University School of Law**
<https://law.emory.edu/index.html>
 Date of JD/LLB **May 1, 2024**
 Class Rank **I am not ranked**
 Law Review/Journal **Yes**
 Journal(s) **Emory International Law Review**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Smibert, Jon
jon.robert.smibert@emory.edu

Koster, Paul
paul.koster@emory.edu

Sipp, Shayla
shayla.sipp@eeoc.gov
470-531-4825

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CLAY B. MARSH

278 Somerlane Pl, Avondale Estates, GA 30002
clayton.marsh@emory.edu | 801-599-3289

June 12, 2023

Chambers of Judge Leslie Abrams Gardner
201 West Broad Avenue
Albany, GA 31701

Dear Judge Gardner,

I am writing to apply for a 2024-2026 clerkship with your chambers. I'm currently a 3L at Emory University School of Law. As I'm currently interning with the U.S. Attorney's Office for the Middle District of Georgia – and aspire to practice in Georgia following graduation – clerking in your chambers would be my first choice for a job upon graduation.

My time with the U.S. Attorney's Office in Macon as exposed me to a plethora of civil and criminal litigation, requiring me to research and write on complex and intriguing legal questions. I've also been able to engage in court proceedings and become familiar with the local rules of the Middle District of Georgia. I believe my experience makes me uniquely qualified to meaningfully contribute to your case load.

Enclosed please find my resume, writing sample, law school transcript and letters of recommendation from the following people:

Administrative Law Judge Jon Smibert
jon.robert.smibert@emory.edu

EEOC Administrative Judge Shalya Sipp
shayla.sipp@eeoc.gov

Professor Paul Koster
paul.koster@emory.edu

Please let me know if I can provide any additional information. I can be reached by phone at (801) 599-3289 or by email at clayton.marsh@emory.edu. Thank you for considering my application.

Respectfully,

Clay B. Marsh

CLAY B. MARSH

278 Somerlane Pl, Avondale Estates, GA 30002
clayton.marsh@emory.edu | 801-599-3289

EDUCATION

Emory University School of Law

Atlanta, GA

Candidate for Juris Doctor

May 2024

- GPA: 3.14
- Activities: Executive Managing Editor – *Emory International Law Review* (Vol. 38), Staff Member (Vol. 37); Executive Editor – *Emory Law School Supreme Court Advocacy Program*; Private Law Chair – *International Law Society*; Student Attorney – *Emory International Humanitarian Law Clinic* (beginning Fall 2023)

George Mason University

Arlington, VA

Master of Public Policy

June 2020

- Activities: Emphasis in National Security Policy; Pi Alpha Alpha – Honor Society for Public Policy
- Honors: Dean's Fellowship

Utah State University

Logan, UT

Bachelor of Arts in Political Science; Minor in Japanese

June 2016

- Activities: *President*, College Democrats; Starting Goalie – Intercollegiate Lacrosse Team; College Radio
- Honors: Dean's List, Merrill Scholar

EXPERIENCE

U.S. Attorney's Office for the Middle District of Georgia – Civil Division

Macon, GA

Summer Law Clerk

May 2023 – August 2023

- Drafting pleadings and motions. Conducting legal writing and research in complex civil litigation related to employment discrimination, bankruptcy, and qui tam cases. Also some white-collar and appellate criminal work.

Superior Court of Fulton County

Atlanta, GA

Legal Extern to the Honorable Thomas A. Cox, Jr.

January 2023 – April 2023

- Drafting legal memos and orders, including motions of summary judgment and motions to dismiss
- Research and apply relevant case law in the judge's civil case docket

U.S. Equal Employment Opportunity Commission

Atlanta, GA

Legal Extern to Administrative Judge Shalya Sipp

May 2022 – August 2022

- Staff the judge for administrative hearings on employment discrimination cases
- Drafting and issuing orders on behalf of the judge.
- Research and apply relevant case law regarding employment discrimination.

Embassy of Japan to the United States

Washington, DC

Senior Research Analyst – Office of Congressional Affairs

March 2017 – July 2020

- Conducted open-source research on procedural and policy issues related to Congress, individual stances on foreign policy, sponsored legislation, and committee membership.
- Led briefings for senior embassy and administration officials in preparation for meetings with congressional counterparts and staffed those officials during said meetings.

The Office of U.S. Senator Harry Reid

Washington, DC

Staff Assistant

January 2016 – January 2017

- Managed administrative tasks such as answering phones, delivering mail, and leading tours of the Capitol building.
- Produced data analysis from constituent correspondence that was reported to the Senator.

ADDITIONAL INFORMATION

- Working proficiency in the Japanese language.
- Interests in sports (NBA, MLB, NHL, UFC), cooking, swimming laps.
- Served as a Mormon missionary in Nagoya, Japan, from March 2009 to March 2011.



Advising Document - Do Not Disseminate

Name: Clayton Marsh
Student ID: 2498070

Institution Info: Emory University
Student Address: 4374 S Winder Farm Pl
Salt Lake City, UT 84124-4140
Print Date: 06/12/2023

Beginning of Academic Record

Fall 2021

Program: Doctor of Law
Plan: Law Major

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	505	Civil Procedure	4.000	4.000	B	12.000
LAW	510	Legislation/Regulation	2.000	2.000	B	6.000
LAW	520	Contracts	4.000	4.000	B	12.000
LAW	535A	Intro.Lgl Anlys, Rsrch & Comm	2.000	2.000	B-	5.400
LAW	550	Torts	4.000	4.000	B+	13.200
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	3.038	Term Totals	16.000	16.000	16.000	48.600
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.038	Comb Totals	16.000	16.000	16.000	48.600
Cum GPA	3.038	Cum Totals	16.000	16.000	16.000	48.600
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.038	Comb Totals	16.000	16.000	16.000	48.600

Spring 2022

Program: Doctor of Law
Plan: Law Major

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	525	Criminal Law	3.000	3.000	B	9.000
LAW	530	Constitutional Law I	4.000	4.000	B-	10.800
LAW	535B	Introduction to Legal Advocacy	2.000	2.000	B	6.000
LAW	545	Property	4.000	4.000	B	12.000
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	732	International Law	3.000	3.000	B	9.000

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	2.925	Term Totals	16.000	16.000	16.000	46.800
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	2.925	Comb Totals	16.000	16.000	16.000	46.800
Cum GPA	2.981	Cum Totals	32.000	32.000	32.000	95.400
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	2.981	Comb Totals	32.000	32.000	32.000	95.400

Fall 2022

Program: Doctor of Law
Plan: Law Major



Advising Document - Do Not Disseminate

Name: Clayton Marsh
Student ID: 2498070

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	669	Employment Discrimination	3.000	3.000	B	9.000
LAW	689R	Rule of Law	3.000	3.000	B+	9.900
LAW	716	Bankruptcy	3.000	3.000	A-	11.100
LAW	727	Citizenship & Immigration Law	3.000	3.000	A-	11.100
LAW	747	Legal Profession	3.000	3.000	B	9.000

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	3.340	Term Totals	15.000	15.000	15.000	50.100
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.340	Comb Totals	15.000	15.000	15.000	50.100
Cum GPA	3.096	Cum Totals	47.000	47.000	47.000	145.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.096	Comb Totals	47.000	47.000	47.000	145.500

Spring 2023

Program: Doctor of Law
Plan: Law Major

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	610	Complex Litigation	3.000	3.000	S	0.000
LAW	632X	Evidence	3.000	3.000	B+	9.900
LAW	671	Trial Techniques	2.000	2.000	S	0.000
LAW	870E	EXTERN: Judicial	1.000	1.000	S	0.000
LAW	871	Extern: Fieldwork	2.000	2.000	S	0.000
LAW	889	Int'l Law Review:Second Year	2.000	2.000	A	8.000

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	3.580	Term Totals	13.000	13.000	5.000	17.900
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.580	Comb Totals	13.000	13.000	5.000	17.900
Cum GPA	3.142	Cum Totals	60.000	60.000	52.000	163.400
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.142	Comb Totals	60.000	60.000	52.000	163.400

Fall 2023

Program: Doctor of Law
Plan: Law Major

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	504X	Advanced Appellate Advocacy	3.000	0.000		0.000
LAW	609L	Intl Commercial Arbitration	3.000	0.000		0.000
LAW	651	Labor Law	2.000	0.000		0.000
LAW	675	Constitutional Lit	3.000	0.000		0.000
LAW	676C	Intn'l Humanitarian Law Clinic	3.000	0.000		0.000
LAW	940	State & Multistate Taxation I	2.000	0.000		0.000

			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	0.000	Term Totals	16.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	16.000	0.000	0.000	0.000



Name: Clayton Marsh
Student ID: 2498070

Advising Document - Do Not Disseminate

Cum GPA	3.142	Cum Totals	76.000	60.000	52.000	163.400
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.142	Comb Totals	76.000	60.000	52.000	163.400
Law Career Totals						
Cum GPA:	3.142	Cum Totals	76.000	60.000	52.000	163.400
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.142	Comb Totals	76.000	60.000	52.000	163.400

End of Advising Document - Do Not Disseminate



June 15, 2023

The Honorable Leslie Abrams Gardner
United States District Court for the Middle District of Georgia
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701

Re : Reference for Clayton Marsh

Dear Judge Gardner:

Mr. Marsh was a student in International Law and the development work. The capstone of this course is a rule of law development work in U.S. embassies. Mr. Marsh wrote an excellent project on the rule of law development work in U.S. embassies.

Few of my students had previous substantive experience and is fluent in Japanese, and has worked in Washington, D.C. He is interested in the concept of the class about constitutional issues and what he is interning with the U.S. Attorney's office. Department of Justice. He asks intelligent questions and observations that draws on his Senate and international

I believe he would be an splendid choice as a writer and researcher, but more importantly he will support any judge well. I am willing to answer any questions you may have.

S i n c e r e l y ,

For Mr _____

Jon S m i b e r t
Adj u n c t P r o f e s s o r o f L a w



June 15, 2023

The Honorable Leslie Abrams Gardner
United States District Court for the Middle District of Georgia
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701

Dear Judge Gardner:

It is my honor to submit this letter of recommendation in support of Clay Marsh's application for a judicial clerkship position with your chambers.

I have had the pleasure to work with Clay through his work with the Emory Law School Supreme Court Advocacy Program ("ELSSCAP") for which I am the faculty advisor, as well as his faculty advisor for the journal article he wrote for the Emory International Law Review ("EILR").

Clay possesses outstanding analytical, research, communication, and advocacy skills. In particular, he has demonstrated an expertise on numerous, complex legal issues through both his work with ELSSCAP and the EILR. Moreover, having had the opportunity to work with Clay in multiple capacities, I have seen the exceptional precision in which he works. Clay has an excellent ability to identify the precise issues upon which a case may turn and then effectively analyze and resolve those issues with clear written and verbal communication skills.

In addition, Clay takes extraordinary initiative to hone his skills, working independently to initiate, develop, and improve his work while at the same time remaining open to suggestions. Furthermore, Clay is conscientious and diligent with his work, caring of his classmates, and maintains a positive attitude while meeting all deadlines.

I highly recommend Clay for a judicial clerkship position with your chambers. Please do not hesitate to contact me if you need any additional information.

Very truly yours,

A handwritten signature in blue ink that reads "Paul R. Koster". The signature is written in a cursive style.

Paul R. Koster

Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322-2270
An equal opportunity, affirmative action university

Tel (404) 727-3957
paul.koster@emory.edu

WRITING SAMPLES

Below, I have attached a legal memo and proposed ordered for one civil case and one criminal case that I completed as an extern to Judge Thomas Cox of the Fulton County Superior Court. I have received permission from my supervising attorney, Mr. Erik Smith, to share these writing samples. I have redacted information that would identify the parties in each case.

TO: Judge Thomas Cox, Erik Smith

FROM: Clay B. Marsh

DATE: March 2023

RE: Councilman v. President: Motion to Dismiss Application for Writ of Certiorari

Recommendation

The Court should **GRANT** Defendant-in-Certiorari's Motion to Dismiss the Petition for a Writ of Certiorari as Petitioner did not timely file the petition according to O.C.G.A. §5-4-6 and therefore must be dismissed.

Factual Summary

This case involves an appeal from a ruling of the City Ethics Panel made by City Councilman. The Petitioner is a member of the City Council. Respondent is president of Community Association, a homeowner's association located with the City. Community Association President filed the complaint against City Councilman with the Ethics Panel. Community Association President's complaint alleged that City Councilman violated several sections of the City Code of Ethics as his participation in a City Council meeting on a cost-sharing plan between the City and Community Association to install radar-controlled speed signs represented a possible conflict of interest. On August 2, 2022, the Ethics Panel conducted an administrative hearing regarding the complaint and rendered a decision on August 30, 2022, in which it was found City Councilman violated the Code of Ethics by participating in votes that represented a conflict of interest. The Ethics Panel recommended a potential sanction for these violations to the City Council. Yet on October 17, 2022, the City Council voted to impose no penalties against City Councilman for the Ethics Code violations.

City Councilman then filed his petition for certiorari on November 16, 2022. The petition alleges the Ethics Panel erred in finding City Councilman violated the Code of Ethics by participating in the City Council Meeting regarding the cost-sharing plan and failing to disclose such possible conflict. It also alleges Community Association President used the complaint process to intimidate and harass City Councilman into supporting the cost-sharing plan. As a result, City Councilman seeks to have the Court reverse the findings of the Ethics Panel, and rule that he did not violate the Ethics Code. He also seeks to have the Court award attorney's fees in accordance with the City Code of Ordinances.

Community Association President filed a Motion to Dismiss the petition on December 21, 2022. The Respondent alleges the petition seeks to challenge the decision of the City Council, which is barred, as petitions of certiorari are not available to review legislative or administrative decisions of local governments. It also states the petition should be dismissed on the grounds it allegedly challenges the Ethics Panel's decision in an untimely manner. State law requires that petitions for certiorari must be filed within 30 days of the decision being challenged. It also states the petition should be dismissed as even if the City Council October 17 decision to impose no sanctions were to qualify as a quasi-judicial act, making City Councilman's filing on November 16 timely, Petitioner lacks standing as he allegedly suffered no injury requiring the Court's intervention in this case. In his response to the motion, City Councilman argues that the City Council's decision on October 17 represents the final resolution in the matter, meaning it qualifies as a quasi-judicial act for which Petitioner can seek certiorari and is not a legislative or administrative decision as Community Association President alleges.

Discussion

O.C.G.A. §5-4-1(a) states: "The writ of certiorari shall lie for the correction of errors committed by any inferior judicatory or any person exercising judicial powers, including the judge of the probate court, except in cases touching the probate of wills, granting letters testamentary, and of administration." Georgia courts have interpreted this language to mean certiorari "is not an appropriate remedy to review or obtain relief from the judgment, decision, or action of an inferior judicatory body rendered in the exercise of legislative, executive, or ministerial functions, as opposed to judicial or quasi-judicial powers." *City of Cumming v. Flowers*, 300 Ga. 820, 823, 797 S.E. 2d 846, 850 (2017) quoting *Presnell v. McCollum*, 112 Ga. App. 579, 579, 145 S.E. 2d 770 (1965).

In determining what is an administrative duty, as opposed to a quasi-judicial act, the Supreme Court of Georgia has stated there are "three essential characteristics of a quasi-judicial act." *Housing Authority of the City of Augusta v. Gould*, 305 Ga. at 545, 826 S.E. 2d 107 (2019). First, a quasi-judicial act occurs where "all parties are as a matter of right entitled to notice and to a hearing, with the opportunity afforded to present evidence under judicial forms of procedure." *Id.* at 551(2), 826 S.E. 2d 107 Next, such an act requires "a decisional process that is judicial in nature, involving an ascertainment of the relevant facts from evidence presented and an application of preexisting legal standards to those facts." *Id.* Third, a quasi-judicial act is "final, binding, and

conclusive on the rights of the interested parties.” *Id.* Lastly, the Supreme Court explains that “generally speaking, an administrative determination is adjudicative in character if it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect.” *State of Ga. v. Int'l Keystone Knights of the Ku Klux Klan, Inc.*, 299 Ga. 392, 401 (4) (a), 788 S.E.2d 455 (2016)

In *Housing Authority*, the Supreme Court of Georgia reversed a decision of the Court of Appeals determining a hearing officer’s decision to uphold a Georgia public housing authority’s termination of Section 8 benefits to be a quasi-judicial decision. 305 Ga. 545. The Supreme Court’s ruling turned on whether the hearing – where the tenant had a right to proper notice and a fair hearing, where she was afforded a right to present evidence under judicial forms of process, and where the hearing officer made his decision after determining the facts under an evidentiary standard and applying appropriate law – was sufficiently final, binding, and conclusive of the rights of the parties for purposes of assessing certiorari jurisdiction under Georgia law. The Court reasoned that the hearing was not sufficiently conclusive, pointing to “regulations that provide in relevant part that a public housing agency is not bound by a decision of a hearing officer,” *Id.*

In this case, the only event that could plausibly be deemed a quasi-judicial decision by a Georgia appellate court, then, is the Ethics Panel’s determination that City Councilman violated the Code of Ethics. The panel conducted a hearing on August 2, 2022. Ethics Panel Ans. 1 Both parties submitted briefs to the panel. Ethics Panel Ans. 1. At the hearing, both parties were represented by counsel and the panel heard from witnesses and arguments made by counsel for both parties. Res. Mot. Dismiss 4. At the conclusion of the hearing, the panel issued findings of fact and legal conclusions according to the City Code of Ethics. Res. Mot. Dismiss 2. The Code of Ethics states the City Council make take up an Ethics Panel determination of a code violation at the conclusion of its hearing to impose a possible punishment. City, Ga., Code § 2-892. (*See* Ethics Panel Ans. 234) However, the City Council is not empowered to override a determination by the Ethics Panel that a violation has occurred. *Id.* at § 2-893(c) (Ethics Panel Ans. 235)

Conversely, the October 17 City Council meeting does not seem to contain indicia of a quasi-judicial decision. The Council did not hear from witnesses, and it was statutorily precluded from reviewing the panel’s determination. Res. Mot. Dismiss 8-9. Thus, the Ethics Panel’s determination of a violation of the code appears to be sufficiently conclusive as an adjudication

on the merits of the complaint filed by City Councilman for purposes of determining certiorari jurisdiction.

Thus, O.C.G.A. 5-4-6 dictates a writ for certiorari in this case should have been filed 30 days from the Ethics Panel's determination of a violation. The Ethics Panel issued their final determination on August 30, 2022, making September 30, 2022, the effective deadline for City Councilman to have timely filed. As City Councilman did not file a petition until November 16, 2022, pursuant to O.C.G.A. 5-4-6, his petition was untimely filed and must be dismissed by the Court.

For the foregoing reason, the Court should **GRANT** respondent's motion to dismiss the petition.

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

CITY COUNCILMAN
Petitioner,

v.

COMMUNITY ASSOCIATION PRESIDENT
Defendant-in-Certiorari/
Opposite Party,

and

CITY OF ETHICS PANEL,
Respondent-in-Certiorari

and

CITY COUNCIL,
Respondent-in-Certiorari.

CIVIL ACTION FILE
CASE NO. 2022CV000000

**ORDER GRANTING DEFENDANT-IN-CERTIORARI'S MOTION TO DISMISS
PETITIONER'S PETITION FOR CERTIORARI**

Before the Court is the Defendant-in-Certiorari's Motion to dismiss City Councilman's Petition for a Writ of Certiorari. Having considered the Motion, together with the briefings, arguments of the parties, the pleadings on file, and the entire record, the Court hereby **GRANTS** Defendant-in-Certiorari's motion. It is, therefore, **ORDERED**, as follows:

FINDINGS OF FACT

This case involves an appeal from a ruling of the City Ethics Panel made by Petitioner City Councilman. The Petitioner is a member of the City Council. Defendant-in-Certiorari is president of the Community Association, a homeowner's association located within the City. Community Association President filed a complaint against City Councilman with the Ethics Panel.

Community Association President's complaint alleged that City Councilman violated several sections of the City Code of Ethics, as his participation in a City Council meeting on a cost-sharing plan between the City and Community Association to install radar-controlled speed signs represented a possible conflict of interest.

On August 2, 2022, the Ethics Panel conducted an administrative hearing regarding the complaint and rendered a decision on August 30, 2022, in which it was found City Councilman violated the Code of Ethics by participating in votes that represented a conflict of interest. The Ethics Panel recommended a potential sanction for these violations to the City Council. Yet on October 17, 2022, the City Council voted to impose no penalties against City Councilman for the Ethics Code violations.

City Councilman then filed his petition for certiorari on November 16, 2022. The petition alleges the Ethics Panel erred in finding City Councilman violated the Code of Ethics by participating in the City Council Meeting regarding the cost-sharing plan and failing to disclose such possible conflict. It also alleges Community Association President used the complaint process to intimidate and harass City Councilman into supporting the cost-sharing plan. As a result, City Councilman seeks to have this Court reverse the findings of the Ethics Panel, and rule that he did not violate the Ethics Code. He also seeks to have this Court award attorney's fees in accordance with the City Code of Ordinances.

Community Association President filed a Motion to Dismiss the petition on December 21, 2022. He alleges the petition seeks to challenge the decision of the City Council, which is barred, as petitions of certiorari are not available to review legislative or administrative decisions of local governments. It also states the petition should be dismissed on the grounds it allegedly challenges the Ethics Panel's decision in an untimely manner. State law requires petitions for

certiorari to be filed within 30 days of the decision being challenged. *See* O.C.G.A. §5-4-6. The motion also states the petition should be dismissed as even if the City Council’s October 17 decision to impose no sanctions were to qualify as a quasi-judicial act, making Petitioner’s filing on November 16 timely, City Councilman lacks standing as he allegedly suffered no injury requiring the Court’s intervention in this case. In his response to the motion, City Councilman argues the City Council’s decision on October 17 represents the final resolution in the matter, meaning it qualifies as a quasi-judicial act for which he can seek certiorari and is not a legislative or administrative decision as Community Association President alleges.

CONCLUSIONS OF LAW

O.C.G.A. §5-4-1(a) states: “The writ of certiorari shall lie for the correction of errors committed by any inferior judicatory or any person exercising judicial powers, including the judge of the probate court, except in cases touching the probate of wills, granting letters testamentary, and of administration.” Georgia courts have interpreted this language to mean certiorari “is not an appropriate remedy to review or obtain relief from the judgment, decision, or action of an inferior judicatory body rendered in the exercise of legislative, executive, or ministerial functions, as opposed to judicial or quasi-judicial powers.” *City of Cumming v. Flowers*, 300 Ga. 820, 823, 797 S.E. 2d 846, 850 (2017) quoting *Presnell v. McCollum*, 112 Ga. App. 579, 579, 145 S.E. 2d 770 (1965).

In determining what is an administrative duty, as opposed to a quasi-judicial act, the Supreme Court of Georgia has stated there are “three essential characteristics of a quasi-judicial act.” *Housing Authority of the City of Augusta v. Gould*, 305 Ga. at 545, 826 S.E. 2d 107 (2019). First, a quasi-judicial act occurs where “all parties are as a matter of right entitled to notice and to a hearing, with the opportunity afforded to present evidence under judicial forms of

procedure.” *Id.* at 551(2), 826 S.E. 2d 107 (citations omitted). Next, such an act requires “a decisional process that is judicial in nature, involving an ascertainment of the relevant facts from evidence presented and an application of preexisting legal standards to those facts.” *Id.* (citations omitted). Third, a quasi-judicial act is “final, binding, and conclusive on the rights of the interested parties.” *Id.* (citations omitted). Lastly, the Supreme Court explains that “generally speaking, an administrative determination is adjudicative in character if it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect.” *State of Ga. v. Int’l Keystone Knights of the Ku Klux Klan, Inc.*, 299 Ga. 392, 401 (4) (a), 788 S.E.2d 455 (2016)

In *Housing Authority*, the Supreme Court of Georgia reversed a decision of the Court of Appeals determining a hearing officer’s decision to uphold a Georgia public housing authority’s termination of Section 8 benefits to be a quasi-judicial decision. 305 Ga. 545. The Supreme Court’s ruling turned on whether the hearing – where the tenant had a right to proper notice and a fair hearing, where she was afforded a right to present evidence under judicial forms of process, and where the hearing officer made his decision after determining the facts under an evidentiary standard and applying appropriate law – was sufficiently final, binding, and conclusive of the rights of the parties for purposes of assessing certiorari jurisdiction under Georgia law. The Court reasoned that the hearing was not sufficiently conclusive, pointing to “regulations that provide in relevant part that a public housing agency is not bound by a decision of a hearing officer,” *Id.*

In this case, the only event that could plausibly be deemed a quasi-judicial decision by a Georgia appellate court, then, is the Ethics Panel’s determination that City Councilman violated the Code of Ethics. The panel conducted a hearing on August 2, 2022. Ethics Panel Ans. 1 Both

parties submitted briefs to the panel. Ethics Panel Ans. 1. At the hearing, both parties were represented by counsel and the panel heard from witnesses and arguments made by counsel for both parties. Res. Mot. Dismiss 4. At the conclusion of the hearing, the panel issued findings of fact and legal conclusions according to the City Code of Ethics. Res. Mot. Dismiss 2. The Code of Ethics states the City Council make take up an Ethics Panel determination of a code violation at the conclusion of its hearing to impose a possible punishment. City, Ga., Code § 2-892. (*See* Ethics Panel Ans. 234) However, the City Council is not empowered to override a determination by the Ethics Panel that a violation has occurred. *Id.* at § 2-893(c) (Ethics Panel Ans. 235)

Conversely, the October 17 City Council meeting does not seem to contain indicia of a quasi-judicial decision. The Council did not hear from witnesses, and it was statutorily precluded from reviewing the panel's determination. Res. Mot. Dismiss 8-9. Thus, the Ethics Panel's determination of a violation of the code appears to be sufficiently conclusive as an adjudication on the merits of the complaint filed by City Councilman for purposes of determining certiorari jurisdiction.

Thus, O.C.G.A. 5-4-6 dictates that a writ for certiorari in this case should have been filed 30 days from the Ethics Panel's determination of a violation. The Ethics Panel issued their final determination on August 30, 2022, making September 30, 2022, the effective deadline for City Councilman to have timely filed. As City Councilman did not file a petition until November 16, 2022, pursuant to O.C.G.A. 5-4-6, his petition was untimely filed and must be dismissed by this Court.

For the foregoing reasons, this Court **GRANTS** Community Association President's Motion to Dismiss the Petition for a Writ of Certiorari.

SO ORDERED, this the ____ day of March 2023.

Thomas A. Cox, Jr., Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

TO: Judge Thomas Cox, Erik Smith

FROM: Clay B. Marsh

DATE: March 2023

RE: State of Georgia v. Inmate; Motion for New Trial on Grounds of Ineffective Assistance of Counsel for Failure to File General Demurrer.

Recommendation

The Court should **DISMISS** the defendant's amended extraordinary motion for new trial as Supreme Court precedent dictates that claims such as the claims defendant raises in the motion should be dismissed and brought under a habeas corpus petition.

Factual Summary

Inmate is currently serving time at the Fulton County Jail, after being found guilty of armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during commission of a felony in November 2011. On September 16, 2022, Mr. Inmate filed an amended Motion for New Trial on the grounds of ineffective assistance of counsel. Mr. Inmate states his trial could have resulted in a different verdict had his attorney raised a general demurrer to the substance of his indictment. Underpinning this, is Mr. Inmate's contention that a valid indictment from a grand jury was never published in open court, pursuant to O.C.G.A. §15-12-74(b). As evidence, Mr. Inmate claims there is no indication in the trial transcript an indictment was returned or recorded. Mr. Inmate contends that as there is no indication of an indictment being returned and recorded, raising a general demurrer would have challenged the sufficiency of the substance of the indictment against him, requiring a new trial where a sufficient indictment must be returned.

Discussion

Pursuant to O.C.G.A. §5-5-40, all motions for new trial, except in extraordinary cases, must be filed within 30 days of entry of the judgement on the verdict. "An extraordinary motion for new trial is one made after the time for filing a motion for new trial has expired." *Dick v. State*, 248 Ga. 898, 899, 287 S.E. 2d 11, 13 (1982). As this motion for a new trial comes roughly ten years after the judgement in Mr. Inmate's trial was returned, it constitutes an extraordinary motion for new trial.

The Supreme Court of Georgia has recently determined an extraordinary motion for new trial is not an appropriate vehicle in which to raise constitutional claims that are cognizable under a habeas corpus petition. *Mitchum v. State*, 306 Ga. 878, 885, 834 S.E. 2d 65 (2019). In *Mitchum*,

the Court held that as the defendant raised constitutional claims that should have been raised in a habeas petition, the proper course of action for the trial court was to dismiss his extraordinary motion for new trial. *Id.* at 886-87. The defendant's motion for new trial detailed him being denied "due process," and his right to "conflict-free defense counsel," based on what he alleged were improper communications between his defense attorney, the prosecuting attorneys, the judge, and the jury. *Id.* at 886.

The Georgia Court of Appeals has also affirmed dismissals of extraordinary motions for new trials based on constitutional claims of ineffective assistance of counsel. See *Weaver v. State*, 359 Ga. App. 784, 860 S.E. 2d 96. In *Weaver*, the defendant's extraordinary motion for new trial argued granting the motion was proper on the grounds that "(1) *substantive defects in the indictment created a fatal variance* . . . and (4) he received ineffective assistance of trial counsel." *Id.* at 786 (emphasis added). When the defendant argued his claims of error stem from statutory rather than constitutional violations, the Court of Appeals, quoting Georgia Supreme Court precedent stated, "The law is clear that any errors which could have been discovered through the exercise of proper diligence cannot form the basis for an extraordinary motion for new trial." *Id.* at 787 quoting *Goodwin v. State*, 240 Ga. 605, 606, 242 S.E. 2d 119 (1978).

Here, Mr. Inmate has brought an extraordinary motion for new trial on the grounds of ineffective assistance of counsel and that substantive defects in the indictment created a fatal variance. Georgia case law dictates such claims cannot be brought in an extraordinary motion for new trial, as a petition for habeas corpus is the proper remedy for such post-conviction relief. Pursuant to precedent set by the Supreme Court of Georgia in *Mitchum v. State*, the proper course of action for this Court is to dismiss Mr. Inmate's motion so that he might be free to bring his claims under a habeas corpus petition.

For the foregoing reason, the Court should **DISMISS** Mr. Inmate's extraordinary motion for a new trial.

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA

Plaintiff,

v.

INMATE

Defendant.

CRIMINAL ACTION FILE
CASE NO. 11SC000000

**ORDER DISMISSING DEFENDANT'S EXTRAORDINARY MOTION FOR NEW
TRIAL**

Before the Court is the Defendant's Extraordinary Motion for New Trial. Having considered the Defendant's filings, the Court **DISMISSES** Defendant's Motion. It is, therefore, **ORDERED**, as follows:

FINDINGS OF FACT

Inmate is currently serving time at the Fulton County Jail, after being found guilty of armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during commission of a felony in November 2011. On September 16, 2022, Mr. Inmate filed an amended Motion for New Trial on the grounds of ineffective assistance of counsel. Mr. Inmate states his trial could have resulted in a different verdict had his attorney raised a general demurrer to the substance of his indictment. Underpinning this, is Mr. Inmate's contention that a valid indictment from a grand jury was never published in open court, pursuant to O.C.G.A. §15-12-74(b). As evidence, Mr. Inmate claims that there is no indication in the trial transcript that an indictment was returned or recorded. Mr. Inmate contends that as there is no indication of an indictment being returned and recorded, raising a general demurrer would have challenged the sufficiency of the

substance of the indictment against him, requiring a new trial where a sufficient indictment must be returned.

CONCLUSIONS OF LAW

Pursuant to O.C.G.A. §5-5-40, all motions for new trial, except in extraordinary cases, must be filed within 30 days of entry of the judgement on the verdict. “An extraordinary motion for new trial is one made after the time for filing a motion for new trial has expired.” *Dick v. State*, 248 Ga. 898, 899, 287 S.E. 2d 11, 13 (1982). As this motion for a new trial comes roughly ten years after the final judgement in Mr. Inmate’s trial was returned, it constitutes an extraordinary motion for new trial.

The Supreme Court of Georgia has recently determined that an extraordinary motion for new trial is not an appropriate vehicle in which to raise constitutional claims that are cognizable under a habeas corpus petition. *See Mitchum v. State*, 306 Ga. 878, 885, 834 S.E. 2d 65 (2019). In *Mitchum*, the Court held that as the defendant raised constitutional claims that should have been raised in a habeas petition, the proper course of action for the trial court was to dismiss his extraordinary motion for new trial. *Id.* at 886-87. The defendant’s motion for new trial detailed him being denied “due process” and his right to “conflict-free defense counsel,” based on what he alleged were improper communications between his defense attorney, the prosecuting attorneys, the judge, and the jury. *Id.* at 886.

The Georgia Court of Appeals has also affirmed dismissals of extraordinary motions for new trials based on constitutional claims of ineffective assistance of counsel. *See Weaver v. State*, 359 Ga. App. 784, 860 S.E. 2d 96. In *Weaver*, the defendant’s extraordinary motion for new trial argued granting the motion was proper on the grounds that “(1) *substantive defects in the indictment created a fatal variance . . . and (4) he received ineffective assistance of trial counsel.*”

Id. at 786 (emphasis added). When the defendant argued his claims of error stem from statutory rather than constitutional violations, the Court of Appeals, quoting Georgia Supreme Court precedent stated, “The law is clear that any errors which could have been discovered through the exercise of proper diligence cannot form the basis for an extraordinary motion for new trial.” *Id.* at 787 quoting *Goodwin v. State*, 240 Ga. 605, 606, 242 S.E. 2d 119 (1978).

Here, Mr. Inmate has brought an extraordinary motion for new trial on the grounds of ineffective assistance of counsel and that substantive defects in the indictment created a fatal variance. Georgia case law dictates such claims cannot be brought in an extraordinary motion for new trial, as a petition for habeas corpus is the proper vehicle for such post-conviction relief. Pursuant to precedent set by the Supreme Court of Georgia in *Mitchum v. State*, the proper course of action for this Court is to dismiss Mr. Inmate’s motion so he might be free to bring his claims under a habeas corpus petition.

For the foregoing reasons, this Court **DISMISSES** Mr. Inmate’s Extraordinary Motion for New Trial.

SO ORDERED, this the ____ day of March 2023.

Thomas A. Cox, Jr., Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

Applicant Details

First Name **Ross**
 Middle Initial **W**
 Last Name **Martin**
 Citizenship Status **U. S. Citizen**
 Email Address rosswmartin@gmail.com

Address
Address
Street
36 Kensington Rd
City
Garden City
State/Territory
New York
Zip
11530
Country
United States

Contact Phone Number **19297991863**
 Other Phone Number **5168779028**

Applicant Education

BA/BS From **Grinnell College**
 Date of BA/BS **December 2002**
 JD/LLB From **Other**
<http://www.lawschool.edu>
 Date of JD/LLB **June 30, 2012**
 LLM From **University of California at Los Angeles (UCLA) Law School**
 Date of LLM **July 19, 2014**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Oxford University Commonwealth Law Journal**
Pacific Basin Law Journal
Southampton Student Law Review
 Moot Court Experience **Yes**
 Moot Court Name(s)

Bar Admission

Admission(s) **New York**

Prior Judicial Experience

Judicial Internships/
Externships **Yes**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Specialized Work
Experience **Appellate**

Recommenders

Dillon, Michael
mickdill@hotmail.com

Jayousi, Areen
areen.jayousi@gmail.com

Snelling, Juliana
jsnelling@canterburylaw.bm

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

June 15, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

Thank you for giving me the opportunity to submit these materials in application for the judicial clerkship for which you are currently recruiting. I believe I would be the ideal candidate for this position.

I have had a diverse career in commercial litigation and arbitration over the past six years, much of it with considerable international elements. I have excelled in oral and written advocacy, and have been entrepreneurial in identifying law firms in considerable need of assistance, enabling me to take up different positions around the world while building a profile in international arbitration.

I recently completed the courses necessary to become a Fellow of the Chartered Institute of Arbitrators in London, which I was named this past September. These courses are designed to enable a fellow to sit as an arbitrator in a commercial dispute. In particular, Module 3, "Award Writing", is designed to teach the candidate how to draft an arbitral award, and I performed admirably in this course, drafting a strong award capable of surviving judicial scrutiny.

Over the course of completing this course, I realized that my main goal in my legal career is to sit as a judge or as an arbitrator, and it is to that end that I am submitting this application for a judicial clerkship in your chambers. I believe I am a strong advocate for clients, but I believe my real talents lie in the equanimous application of the law.

I have taken the liberty of including the arbitral award I drafted last summer. This award far exceeds any page limit, but I think that it, more than anything I have ever written, demonstrates my ability to draft a reasoned judgment of the sort that I would be expected to draft in your chambers. In other words, as your clerk, I would be able to hit the ground running.

Best regards,

Ross W. Martin

Ross W. Martin

rosswmartin@gmail.com – +1 929 799 1863 – Citizenship: USA

Bar Admissions

- **New York.** Attorney. April 2016.
- **England and Wales.** Solicitor. November 2019. Current practicing certificate.
- **Astana International Financial Centre.** Rights of Audience. September 2021.
- **Washington State.** Attorney. January 2022.
- **England and Wales.** Barrister. Date of call: July 2022. Non-practicing.

Education

Chartered Institute of Arbitrators. International arbitration courses. 2021-2022. All three Modules complete. Admission to Fellowship (FCIArb): September 2022.

University of California, Los Angeles, School of Law. Master of Laws, 2014 – 2015. Concentration in American business law. Managing Editor: UCLA Pacific Basin Law Journal. Moot Court Honors Program.

University of Oxford. Bachelor of Civil Law (a highly advanced, post-J.D., common law degree), 2012 – 2014. Concentration in English and European commercial law. Associate Editor: Oxford University Commonwealth Law Journal.

University of Southampton. Bachelor of Laws (equivalent to a J.D.), 2010 – 2012. First Class Honours. Editor-in-Chief: Southampton Student Law Review.

University of British Columbia. Master of Arts. European Studies, 2004 – 2006.

Grinnell College. Bachelor of Arts. History and Western European Studies, 1998 – 2002.

Experience

Hecht Partners. New York. *Senior Counsel.* July 2022 – present. Commercial litigation, international arbitration, and investor-state dispute settlement. Engaged in research, drafted memos and briefs, managed own workload with little supervision, supervised one paralegal.

- Played important role in large investment dispute brought under bilateral investment treaty against a country in Central Europe. Conducted research concerning claims settlement treaties, *res judicata* effect of national judicial decisions in international law, legality requirement under bilateral investment treaty. Contributed text to reply brief on jurisdiction.
- Played important role in large investment dispute brought under Energy Charter Treaty against a country in Central Europe. Conducted research concerning expropriation, fair and equitable treatment standard.
- Played central role in large series of arbitration proceedings involving multiple claimants against a not-for-profit entity at AAA and JAMS.

Horizons & Co. Dubai. *Senior Associate.* July 2021 – July 2022. International arbitration and commercial litigation. Construction, commercial, company, and investment disputes. Undertook knowledge management project for firm. Managed one associate and three paralegals.

- *Construction Arbitration:*
 - Full care and conduct for medium-scale construction arbitration from start to finish without supervision. Drafted statement of claim, reply, costs submissions. Undertook correspondence with tribunal.
 - Played important role in large multi-party construction dispute pursuing encashment of performance bonds. Contributed significant work regarding back-to-back clauses.
 - Played important role in matter successfully resisting injunction preventing encashment of six performance bonds.
 - Drafted legal notice, notice of dispute, injunction application, and draft penal order in commercial construction dispute.
 - Drafted opinion, legal notice in large retail shopping mall dispute.
 - Contributed research, drafting to reply in construction dispute worth \$80 million.
- *Commercial Arbitration:*
 - Full care and conduct for international corporate arbitration from start to finish without supervision. Drafted statement of claim, reply, costs submissions. Undertook correspondence with tribunal
 - Drafted injunction application, statement of case, affidavit, and draft penal order for important UAE ports facilities dispute.
- *Other:*
 - Contributed to Expert Opinion regarding UAE bankruptcy law. Provided answers to twenty-one specific inquiries and general matters. Principal responsible for most drafting elements.
 - Participated in representation of discharged employee in large employment mediation. Interviewed client, drafted and prepared most material relied upon.

Canterbury Law Limited. Bermuda. *Contract legal consultant.* July 2020 – June 2021. Associate-equivalent role completed remotely from New York due to COVID-19 pandemic. Undertaken on contract/per matter basis while taking courses in business and finance.

- *International insurance.* Participated in large insurance-industry arbitration concerning status of several insurance policies and status of Chief Underwriting Officer of an international insurance company. Drafted 150-page witness statement for CEO. Contributed heavily to submissions.
- *Employment.* Participated in several important employment disputes, including senior management and members of government. Drafted employee manuals, policy documents, and revised employment contracts incorporating legislative changes.

Urbanetic. Phnom Penh/Singapore. *Contract legal consultant.* February 2020 – June 2020. Advised multi-million-dollar block-chain software regarding smart cities project in Phnom Penh.

BNG Legal. Phnom Penh. *Legal counsel.* August 2019 – February 2020. Legal counsel at international law firm until COVID-19 outbreak. Managed General Practice and Myanmar teams, working exclusively for international clients. Broadened transactional experience while maintaining focus on international litigation. Engaged in substantial business development efforts.

- *Myanmar practice.* Engaged in substantial research concerning Myanmar company, investment, and commercial law. Participated in company registration in Myanmar. Engaged in research concerning company dispute in Myanmar. Participated in the sale of two ships from a Myanmar entity to an international entity.
- *Cambodian disputes practice.* Engaged in Cambodian litigation concerning a casino; engaged in Cambodian litigation concerning property disputes; participated in arrest of ship in Cambodian waters. Developed materials relating to international arbitration, including Cambodia's National Commercial Arbitration Centre.
- *Cambodian transactional practice.* Engaged in several land transactions; incorporation of non-profit entities; engaged in substantial research concerning mining industry of Cambodia; engaged in substantial research concerning arbitration and dispute resolution in Cambodia.

Adrian & Associates. New York. *Associate.* March 2018 – April 2019. Associate at boutique commercial litigation firm practicing complex commercial litigation, appellate litigation, securities class action defense, insurance coverage, corporate disputes, and alternative dispute resolution including arbitration. Clients include both international and domestic entities. Developed practical skills in litigation: drafting pleadings, motions, memoranda of law, stipulations, affidavits, attorney affirmations, discovery requests, oral argument on motions, and settlement conferences. Gained extensive experience in New York state and U.S. federal practice.

- *Securities Fraud.* Participated in the defense of President of Services in the *Oklahoma Firefighters Pension and Retirement System v. Xerox Corporation* class-action case heard at the Second Circuit Court of Appeals. Drafted extensive memorandum concerning the application of Federal Rule of Civil Procedure §12(b)(6) motions to dismiss.
- *Insurance Coverage.* Engaged in research and all procedural steps involved in successive appeals to the Appellate Division First Department and the New York Court of Appeals concerning the requirement of a finding of proximate causation by the primary insured before additional insured status can be claimed in regards to the duty to defend under an insurance policy.
- *Corporate litigation.* Held primary responsibility for a case concerning the formation of a small company and its alleged fraudulent misappropriation by several of its shareholders. Contributed to drafting of complaint. Drafted memorandum of law in opposition to motion for summary judgment and reply briefs.
- *Employment.* Drafted opposition to motion for summary judgment and reply briefs in case concerning termination of employment of a legal executive. Case concerned alleged mutual mistake and rectification of contract.
- *Appellate litigation.* Created documents initiating appeal in a case concerning pollution from the September 11, 2001, terrorist attacks. Drafted extensive memorandum concerning exclusion of liability for injuries caused by pollution. Participated in subsequent settlement negotiations, ultimately reducing client's liability significantly.
- *Arbitration.* Contributed research to extractive industry arbitration in Saudi Arabia.

McNair Chambers. Doha, Qatar. *Associate.* February 2017 – December 2017. Associate at prominent barristers' chambers practicing international commercial litigation, international commercial arbitration, investor-state dispute settlement, and public international law. Contributed research to several high-worth international arbitrations at ICSID, ICC, LCIA, QICCA and arbitrations under UNCITRAL rules, and researched UNCLOS rules. Contributed to several particulars of claim. Attended conferences, engaged in research for publication.

- *Public International Law*. Participated in the *Jadhav* case heard at the International Court of Justice in 2017. Researched law on consular access, clean hands doctrine, provisional measures in public international law. Additionally, conducted research on the Falkland Islands dispute.
- *Mining and extractive industries*. Engaged in research related to international investment law, mining of metals, political and social conditions in Pakistan, mining valuation and quantification.
- *Insolvency and Fraud*. Produced report on the cooperation between the Serious Fraud Office of the United Kingdom and authorities in an offshore jurisdiction concerning a multi-national insolvency and fraud case in the financial industry.
- *International investment*. Participated in initial stages of an arbitration related to expropriation, fair and equitable treatment, full protection and security concerning an investment in the Caribbean. Drafted demand letter and request for arbitration.
- *Arbitration Act 1996*. Examined implications of the recent *IPCO* decision by the UK Supreme Court concerning adjournment of proceedings in several cases.
- *Telecommunications*. Produced report on competition law issues regarding entrance into Qatari market, use of existing infrastructure. Contributed to draft of particulars of claim.
- *Shipping*. Researched issues relating to force majeure clauses in the shipping industry following the blockade on Qatar. Engaged in research related to US sanctions on Iran. Worked on arbitration related to loading dispute, participated in taking and drafting of witness statement.
- *Hospitality*. Researched issues related to enforcement of arbitral award of tribunal seated outside of the UK in English High Court and Court of Appeal related to the construction of a hotel in a third jurisdiction.

Deloitte. Jersey City, New Jersey. *Contract attorney*. April 2016 – February 2017. German-language document review pertaining to the Volkswagen Emissions Scandal. Learned management aspects of the automotive industry. Further developed German language skills.

Bar Exam Tutor. Tutor for New York Bar Exam for private clients and a company called LLM Bar Exam.

Forrest Solutions, New York, NY. *Paralegal*. September 2015 – October 2015. Extracted critical data from over one hundred employment contracts, helped build an online database.

Community Service Society. New York, NY. *Volunteer, legal team*. August – September 2015. Challenged denials of coverage by medical insurance companies. Drafted memo and external appeal.

California Court of Appeal. Los Angeles, CA. *Extern*. January – May 2015. Worked as legal extern under a research attorney for Justice Jeffrey Johnson. Researched appellate procedural law, demurrer pleading.

Barristers' Chambers. London. *Mini-pupil*. December 2012 – August 2013. Undertook ten short internships at top commercial and chancery barristers' chambers in London.

University of Southampton School of Law. Southampton, UK. *Research Assistant*. Summer 2011. Research assistant to Dr Özlem Gürses researching insurance and reinsurance law.

ESL Schools in South Korea, China, Ukraine, Germany. *English Teacher*. 2007 – 2010. Taught English to students ranging from children to business people. Developed learning materials. Traveled extensively in over 45 countries on four continents.

LANGUAGES:

German. Fluent, academic writing proficiency.

Spanish. Upper intermediate, actively learning.



University of Southampton Diploma Supplement

Section 1 Information identifying the Holder of the Qualification

Student Name Ross Martin
Date of Birth 8 August 1980
Student ID 24262544
HESA ID 1011602625448

Section 2 Information identifying the Qualification

Qualification Achieved

Bachelor of Laws Law

Classification

with First Class Honours

Date Awarded

22 June 2012

Date of Admission

30 September 2010

Date of Leaving

22 June 2012

Awarding Institution

University of Southampton

Teaching Campus

Southampton campuses

Language of Instruction

English

Section 3 Information on the Level of Qualification

Programme Level

Undergraduate

Length of Programme

21 Months

Mode of Study

Full Time

Section 4 Programme Outcomes and Results Gained

2010/11		Level	UK Credits	ECTS	Code	Mark
LAWS1012	Legal System and Reasoning	NQF4	30	15	OE	63
LAWS1013	Constitutional & Admin. Law	NQF4	30	15	OE	70
LAWS1014	Criminal Law	NQF4	30	15	OE	71
LAWS1015	Law of Contract	NQF4	30	15	OE	73

Continued...

Bald Nutbeam
 Vice-Chancellor



T. J. Hammar
 Registrar

This document is not proof of an Award.
 It should be read in conjunction with the explanatory notes overleaf.

Understanding this document

This Diploma Supplement was developed by the European Commission, Council of Europe and UNESCO/CEPES. The purpose of the supplement is to provide sufficient data to improve the international transparency and fair academic and professional recognition of qualifications (diplomas, degrees, certificates etc.). It is designed to provide a description of the nature, level, context, content and status of the studies that were pursued and successfully completed by the individual named on the original qualification to which this supplement is appended. It is free from any value judgements, equivalence statements or suggestions about recognition.

The information given overleaf is provided by the University*, under the terms of the Data Protection Act 1998, from its student administration system as the academic and identifying personal information recorded for the student named. It is issued with an explanatory document, 'The University of Southampton Explanatory Notes on the Diploma Supplement"', and, when read together, it constitutes a full Diploma Supplement.

The Diploma Supplement is divided into the following eight sections: section one, information identifying the holder of the qualification; section two, information identifying the qualification; section three, information on the level of the qualification; section four, information on the content of the qualification and the results gained; section five, information on the function of the qualification; section six, additional information; section seven, certification of the Diploma Supplement and section eight, a summary and description of the UK Higher Education and Training System. Sections on this document are numbered appropriately to correspond with this convention. Sections six and eight, and aspects of sections three, four and five, are continued in the explanatory document.

The University issues its full Diploma Supplement solely to students who completed the requirements for the award of one of its degrees or other qualifications in or after the academic year 2008-09***. The transcript information alone is provided to students who completed studies before 2008 or who have undertaken studies which did not lead to the award of a degree or other qualification by the University.

A transcript is an authoritative and official record of a learner's programme of study to date, the grades they have achieved and the credit they have gained. Neither the Diploma Supplement nor the transcript is proof of an Award from the University.

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0/NQF3 Level 3 (Foundation level)	6/NQF7 Level 7 (Master)
1/NQF4 Level 4 (Certificate of Higher Education level)	7/NQF7 Level 7 (Master of Philosophy)
2/NQF5 Level 5 (Diploma of Higher Education level)	8/NQF8 Level 8 (Doctorate)
3/NQF6 Level 6 (Bachelor including Advanced Diploma in Nursing)	L1-L7 Language competency levels 1-7

The modules and credits studied in each programme year are set out in the individual programme specification as published.

All the module outcomes obtained by a student are represented on this document. The module outcome is represented by a mark. Numerical marks are shown in the University's 0-100 scale. Non numerical marks are shown on a scale of A, B, C, D, E, F. The letter P denotes a Pass and the letter F denotes a Fail, where the module is being marked on a pass/fail basis. Where P is used as postscript to a numerical mark it denotes that the module has been passed, even though the mark appears to be below the module pass mark. Where F is used as postscript to a numerical mark it denotes that the module has been failed, even though the mark appears to be above the module pass mark. The notation 'AU' indicates that the module was audited: this means that the student attended the teaching, but assessment was not taken for any credit. The notation 'AUAB' indicates authorised absence from the assessment of the module. Each mark printed on this document is accompanied by relevant mark code. The code denotes as follows:

OE – Original Entry;	recording the student's original achievement in the first attempt at the module assessment
RE – Referral;	recording the student's achievement in the referral sitting of a module when the original achievement was not a pass
CR – Capped mark;	recording the level at which the student's mark was capped following referral, according to the regulations used for progression and in the classification of Award
OM – Original Mark;	recording the student's achievement when taking a referral as if for the first time according to the regulations used in progression and in the classification of Award

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* or one of its accredited colleges or affiliated institutions

** available from the University website www.southampton.ac.uk

*** it is issued to BM students who complete in or after the academic year 2011-12

University of Southampton

Diploma Supplement



Student Name Ross Martin
Student ID 24262544

HESA ID 1011602625448

Section 4 Programme Outcomes and Results Gained

2011/12		Level	UK Credits	ECTS	Code	Mark
LAWS2019	Law of Torts	NQF5	30	15	OE	AU
LAWS3052	Legal Research and Writing	NQF6	30	15	OE	68
LAWS3075	Equity and Trusts	NQF6	30	15	OE	68
LAWS3076	European Union Law	NQF6	30	15	OE	75
LAWS3077	Land Law	NQF6	30	15	OE	70
LAWS3078	Law of Torts	NQF6	30	15	OE	72

Results List Ends

Section 5 Information on the function of the Qualification

No Professional Registration statement recorded.

Date Printed | 10 July 2012

Bald Nutbeam
 Vice-Chancellor



T. J. Hammar
 Registrar

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2/NQF5 Level 5 (Diploma of Higher Education level)	8/NQF8 Level 8 (Doctorate)
3/NQF6 Level 6 (Bachelor including Advanced Diploma in Nursing)	L1-L7 Language competency levels 1-7

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All the module outcomes obtained by a student are represented on this document. The module outcome is represented by a mark. Numerical marks are shown in the University's 0-100 scale. Non numerical marks are shown on a scale of A, B, C, D, E, F. The letter P denotes a Pass and the letter F denotes a Fail, where the module is being marked on a pass/fail basis. Where P is used as postscript to a numerical mark it denotes that the module has been passed, even though the mark appears to be below the module pass mark. Where F is used as postscript to a numerical mark it denotes that the module has been failed, even though the mark appears to be above the module pass mark. The notation 'AU' indicates that the module was audited: this means that the student attended the teaching, but assessment was not taken for any credit. The notation 'AUAB' indicates authorised absence from the assessment of the module. Each mark printed on this document is accompanied by relevant mark code. The code denotes as follows:

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[#] or one of its accredited colleges or affiliated institutions

^{##} available from the University website www.southampton.ac.uk

^{###} it is issued to BM students who complete in or after the academic year 2011-12

**ACADEMIC TRANSCRIPT****Personal Information**

Student: Ross W MARTIN
 University Reference: 631330
 Qualification Sought: Bachelor of Civil Law
 Start Date: 09 October 2012

Date of Birth: 08 August 1980
 HESA Reference: 1211560632067
 FHEQ Level: Masters
 End Date: 17 July 2014

Programme Information

Teaching Institution: University of Oxford
 College: University College
 Programme of Study: Bachelor of Civil Law

Awarding Institution: University of Oxford
 Mode of Attendance: Full Time
 Language of Instruction: English

Award Information

Qualification Awarded: Bachelor of Civil Law
 Classification: Pass
 Date of Award: 17 July 2014

Assessment Information**Academic**

Year	Assessment Name	Result	Attempt
		Mark/Grade	Number
2013/14	Commercial Remedies	50	2
2013/14	Competition Law	67	2
2013/14	Corporate and Business Taxation	56	2
2013/14	Restitution of Unjust Enrichment	44	2

Pass: For the award of the degree of BCL or MJur there must be no mark lower than 50. A mark lower than 50 but greater than 40 may be compensated by very good performance elsewhere, but a mark of 40 or below is not susceptible of compensation. Distinction: For the award of a Distinction in BCL or MJur a candidate must secure marks of 70 or above on two or more papers (The optional dissertation counts as one paper for these purposes). In addition, there must be no other mark lower than 60. It is important to appreciate that these conventions are not inflexible rules. The examiners have a residual discretion to deal with unusual cases and circumstances.

End of Transcript

Transcript printed on 17 July 2014

Page 1 of 1

Eva G. McKeand

Registrar

Student Copy / Personal Use Only | [204537794] [MARTIN, ROSS]

University of California, Los Angeles

LAW Student Copy Transcript Report

For Personal Use Only

This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name: MARTIN, ROSS W
 UCLA ID: 204537794
 Date of Birth: 08/08/XXXX
 Version: 08/2014 | SAITONE
 Generation Date: June 22, 2021 | 02:19:08 PM
 This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/13/2014
 SCHOOL OF LAW
 Major:
 LAW-LLM
 Specializing in BUSINESS LAW - BUSINESS LAW TRACK

Degrees | Certificates Awarded

MASTER OF LAWS Awarded May 15, 2015
 in LAW-LLM
 With a Specialization in BUSINESS LAW - BUSINESS LAW TRACK

Previous Degrees

None Reported

Fall Semester 2014

Major: LAW-LLM					
INTRO FED INCOME TX	LAW 220	4.0	13.2	B+	
REMEDIES	LAW 300	4.0	16.0	A	
PROFESSIONAL RESPON	LAW 312	2.0	7.4	A-	
CONTRACTS - LLM	LAW 403	2.0	8.0	A	
AMER LW/GLOBAL CNTX	LAW 570	2.0	0.0	P	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		14.0	14.0	44.6	3.717

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Spring Semester 2015

BUSINESS ASSOCIATNS	LAW 230	4.0	0.0	P	
SECURED TRANSACTNS	LAW 250	3.0	8.1	B-	
LLM LEGAL RESEARCH	LAW 406	2.0	0.0	P	
STATE APPELLATE	LAW 781	4.0	0.0	P	
NEGOTIATION THEORY	LAW 972	3.0	9.0	B	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		16.0	16.0	17.1	2.850

LAW Totals

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Pass/Unsatisfactory Total	12.0	12.0	N/a	N/a
Graded Total	18.0	18.0	N/a	N/a
Cumulative Total	30.0	30.0	61.7	3.428
Total Completed Units	30.0			

END OF RECORD
NO ENTRIES BELOW THIS LINE



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March 8, 2023

To whom it may concern:

I am Bermudian by birth and am a Director of the law firm, Canterbury Law Limited, a civil and commercial law firm in Bermuda where I practice employment law and related commercial dispute resolution. I have been practicing law in Bermuda for 27 years and I am a Rhodes Scholar. I am writing this letter to enthusiastically recommend Mr. Ross W. Martin.

Ross worked for me remotely from July 2020 to July 2021 as a consulting/contract attorney, assisting me on multiple matters, most notably a large employment arbitration pertaining to the work of an insurance company headquartered in Bermuda. Ross reached out to me in early 2020, and I was immediately impressed not only by his qualifications but also by his entrepreneurial nature and willingness to seek me out. We worked out an arrangement whereby he worked for me remotely, checking in with me on a daily basis.

In our large arbitration, Ross was tasked with drafting the witness statement for the CEO of this insurance company and contributing substantively to legal submissions. Ross was readily able to win the confidence of the CEO with his professional demeanour and willingness to learn the business of insurance and learn how decisions are made on both qualitative and quantitative levels. The lengthy and detailed witness statement he drafted was of exceptional quality.

His contributions to our submissions were excellent, and demonstrated considerable research skills and genuine understanding of the relevant legal issues. Legal research in Bermuda is not easy; although the law of Bermuda and the Caribbean is based on common law principles, databases are poorly organized and significant effort is required to identify authority applicable to a case. Ross was readily able to adapt to this practice.

Finally, I was impressed with Ross's teamwork skills. He worked relatively autonomously, but made sure I was aware of the work he was undertaking and how he was progressing. In his daily debriefing emails to which he attached his work product, he was able to describe what he had accomplished, candidly explain its strengths and weaknesses, and identify where he needed guidance and supervision without ever having me feel burdened. He is personable and friendly, and was a pleasure to work with.

Ross has proven to be a dependable lawyer with a passion for his work. Should you wish to inquire further about his qualifications, please feel free to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Juliana Marie Snelling'.

Juliana Marie Snelling
+1 (441) 505-6131
jnelling@canterburylaw.bm

**IN THE MATTER OF AN AD HOC ARBITRATION UNDER THE
UNCITRAL RULES 2013, AS AMENDED**

Between:

Tarens Construction Ltd

Claimant

and

Pryontics Ltd

Respondent

FINAL AWARD

Claimant's Representatives:

Advocate Chloe Burns

Respondent's Representatives:

Advocate Abdullah Rahmanovich

Arbitrator:

Dr Dara Nagambi

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INTRODUCTION AND BACKGROUND TO THE CLAIM

1. The Claimant party, Tarens Construction Ltd, Registered Number N3327876, with registered office at The Yard, Northampton, Northistan, 88354, is a company incorporated under the laws of Northistan. It describes itself as a family-run construction firm and has the role of contractor in the Northistan electricity substation project (the “Project”).
2. The Respondent party, Pryontics Ltd, Northistan, Registered Number SL23332, with registered office at Hertha Ayrton Towers, Southsea, Southland, 25345, is a company incorporated under the laws of Southland. It has the role of employer in the Project.
3. These parties (the “Parties”) are in dispute. The uncontroversial background to their dispute is as follows. The Parties are commercial actors represented by counsel, and it is appropriate that uncontested facts be taken as admitted.¹
 - 3.1. The Parties entered into a contract (the “Contract”) on 1 July 2020 under the laws of Northistan to build an electricity substation in Northistan. The contract was formally titled “Build Contract NISTN/40034/22”. The Contract included terms for the payment of an Advance Payment of N\$2,000,000 “*as an interest-free loan for mobilisation*” and the payment of 48 monthly interim payment certificates of N\$500,000 on or before the 28th of each calendar month on submission of duly certified IPCs before the 23rd day of that month. The Contract included terms for Determinations by the Engineer; variations by the Engineer and the Contractor; procedures for approval of variations; the Contractor’s entitlement to suspend work; and termination by the contractor.
 - 3.2. The Respondent paid an advance of N\$2,000,000 to the Claimant upon the execution of the Contract by the Parties on 1 July 2020. Mobilisation took place between 1 July 2020 and 31 July 2020, and work started on 1 August 2020.
 - 3.3. The Respondent provided design work to the Claimant at the beginning of the Contract.
 - 3.4. The Respondent at some point thereafter modified the contract in such a way as to render the design impossible to execute in regards to Tank Room No. 8.
 - 3.5. The Claimant notified the Engineer on 5 October 2020 of what it believed were problems with machinery fitting in Tank Room No. 8.
 - 3.6. On 8 October 2020, the Claimant submitted a Value Engineering Variation request to the Engineer.
 - 3.7. On 10 October 2020, the Engineer replied to the Claimant, saying that the Claimant was not responsible for design work and had to build as designed.

¹ *Harris International Communications v Islamic Republic of Iran*, Award No. 323-409-1 (November 2, 1987), reprinted in Iran-US CTR 31, 47 (1987-IV)

- 3.8. On 1 November 2020, the Claimant gave instructions to its team to proceed with changes to Tank Room No. 8.
- 3.9. On 3 November 2020, the Claimant wrote to the Respondent to explain its perspective on what had gone wrong, and to request N\$1,000,000 for what it claimed was reimbursement for its costs.
- 3.10. At some point soon after 3 November 2020, the Respondent replied to the Claimant, stating that the changes were unsolicited, and refusing payment or Variation order.
- 3.11. On 28 January 2021, the Respondent failed to pay IPC No. 5, and subsequently failed to pay IPCs Nos. 6, 7 and 8 as they became payable.
- 3.12. On 25 February 2021, the Claimant gave notice to terminate the Contract.
- 3.13. On 1 May 2021, the Claimant terminated the contract.
- 3.14. On 7 June 2021, the Claimant made an offer to the Respondent to settle the dispute for N\$3,000,000. The Respondent refused this offer, and threatened to cash the letter of credit.
- 3.15. 15 June 2021, the Respondent made a without prejudice settlement offer to settle the matter with the Claimant for N\$1,000,000. On 16 June 2021, the Claimant rejected this letter.
- 3.16. On 20 June 2021, the Respondent made another settlement offer for N\$1,500,000. On 1 July 2021, the Claimant rejected this offer.
- 3.17. On 1 July 2020, the Claimant filed a Notice of Arbitration in which the name of the Respondent was written as “Pyrontics Ltd, Northistan” three times: in the carbon-copy recipient list; in the body of the email; and in the table of contact details for the Parties. This was accompanied by an apparent misspelling of the name of the CEO of the Respondent; in the email this individual was identified as “Marco Pyro”, whereas in subsequent correspondence, this individual was identified as “Marco Pryon”.
4. I shall set out the relevant operative provisions of the Contract below, as and when they become material. For present purposes it suffices to note Sub-Clause 21.2 of the Contract (the “Arbitration Clause”), contains an agreement to submit all disputes arising out of or connection with the Contract to arbitration. The Arbitration Clause in full provides:

21.1 If the Parties agree to constitute a Dispute Board, and the Dispute Board fails to render a decision within 100 days of the constitution of the Dispute Board, either Party may initiate arbitration.

21.2 Provided that no Dispute Board has been constituted, or that the Dispute Board has failed to render its decision within 100 days of constitution, all disputes arising out of or in connection with this Contract shall be finally resolved by

binding arbitration on an ad hoc basis between the parties to this Contract, in Easthead under UNCITRAL Arbitration Rules. A sole arbitrator will be appointed by the Easthead Arbitration Institute, (EAI), in its capacity as appointing authority. The language of arbitration shall be English.

5. In short summary, the Claimant alleges that:
 - 5.1. the Respondent is liable for the cost of the variation works it made to Tank Room No. 8, for a cost of N\$1,000,000, due to the Engineer's failure to deal with the matter; and
 - 5.2. the Respondent owes N\$500,000 on IPCs Nos. 5, 6, 7, and 8, for a total of N\$2,000,000, due to the Respondent's failure to pay on these IPCs as they allegedly came due.
6. The Respondent disputes the allegation, arguing that:
 - 6.1. the works done by the Claimant to Tank Room No. 8 were unsolicited, and thus that no monies are due for those works.
 - 6.2. the Advance of N\$2,00,000 covers the 4 unpaid IPCs.
7. The Parties, are, however, in agreement that:
 - 7.1. the Arbitration Clause as written above is correct and applies to the dispute that has arisen between them;
 - 7.2. the seat of arbitration is Easthead;
 - 7.3. the Easthead Arbitration Institute (EAI) shall be the appointing authority, by virtue of Sub-Clause 21.2 of the Contract;
 - 7.4. the language of the arbitration shall be English, by virtue of Sub-Clause 21.2 of the Contract;
 - 7.5. the UNCITRAL Arbitration Rules, 2013, as amended, apply by virtue of the Arbitration Agreement
 - 7.6. the IBA Rules of Evidence 2020 apply by consent.

PROCEDURAL HISTORY

8. As noted above, the Claimant began the arbitration process by filing, via its representative, a Notice of Arbitration with the Easthead Arbitration Institute in its capacity as appointing authority and the Respondent on 1 July 2021.
9. The EAI contacted me via email on 5 July 2021 to propose to nominate me for the position of arbitrator in its capacity as appointing authority under Sub-Clause 21.2. They attached their form, "Conflict Check and Availability Form Arb," and requested that I return it via email.

10. I considered whether there might be any conflicts of interest or any other reason why I should not accept the appointment. Having concluded there were no such reasons, I wrote back to the EAI on 6 July 2021 to accept the nomination and to confirm that I considered myself suitably qualified. In this communication, I noted that I had been unable to find “Pyrontics Ltd” on the Southland Companies Register, but that I had found “Pryontics” at the same address. I stated that I assumed this had been a typographical error.
11. The EAI wrote back to me on 12 July 2021 to confirm that it had received my documents. The EAI stated that it would write to the Parties on 15 July 2021 to officially notify the Parties of my notification; the EAI stated that this would constitute my appointment date. The EAI thanked me for pointing out the error in the Respondent’s Company name and stated that the EAI had corrected it in the EAI’s records.
12. The EAI wrote to the Parties and to me on 15 July 2021, stating that it acknowledged the Claimant had commenced arbitration against the Respondent, identified as Pryontics Ltd, and attaching the Notice of Arbitration email. The EAI further stated that it had named me as arbitrator in this arbitration, pursuant to Sub-Clause 21.2 of the Contract.
13. Later that day, I emailed the parties and the EAI to acknowledge the EAI’s email and my appointment as sole arbitrator in the present dispute. I proposed a Procedural (or, preliminary) Meeting for 25 July 2021, to be held virtually at 2 PM. I attached my terms of appointment, which I requested the Parties sign and return to in advance of the Preliminary Meeting; I noted the requirement of an advance on my fee, which was required to be paid equally by each party in advance of the Preliminary Meeting.
14. Following this email on 15 July 2021, the CEO of the Respondent, Marco Pryon, emailed me, counsel for the Claimant, and the registrar for EAI stating the arbitral tribunal had not been properly constituted due to the jurisdictional challenges the Respondent later brought.
15. In response to this email, on 15 July 2021, I replied to the CEO of the Respondent, stating that, as I had been appointed as an arbitrator, I would deal with this under my authority as given in the rules and law, while giving the Respondent ample opportunity to state any objections to my jurisdiction.
16. The Preliminary Meeting was duly held on 25 July 2021.
17. At the Preliminary meeting, counsel for the Parties confirmed that the Arbitration Clause within the Contract was as communicated to me by the EAI and sent an agreed copy of the Contract. The Parties confirmed that the seat of arbitration is Easthead. The Parties agreed that the substantive law of the Contract was that of Northistan and agreed that both the Contract and the Arbitration Agreement were valid. At my request, the Parties also agreed that the IBA Rules of Evidence would be accepted as binding in this arbitration.
18. The Parties also agreed:
 - 18.1. A costs cap on party costs of E£500,000 per party total would apply;

- 18.2. Costs of and occasioned by the preliminary meeting were to be costs in the arbitration
- 18.3. All communications to me by either party shall be copied to the other party and marked to that effect.
- 18.4. The currency of the Award was to be Easthead Pounds (E£)
- 18.5. Exchange rate was to be fixed at 1 N\$ = 1.5 E£.
- 18.6. Both Parties would be allowed to appoint expert witnesses.
19. The Parties agreed on this timetable:
- | | |
|-------------|--|
| 01.10.21 | Statement of Claim |
| 01.11.21 | Statement of Response and Counterclaim |
| 01.12.21 | Statement of Response to Counterclaim |
| 06.01.22 | Cut-off date for evidence |
| 08.01.22 | Claimant to submit an agreed core bundle of documents for the hearing. |
| 10-13.01.22 | Hearing and Witness statements |
20. At this the Preliminary Hearing, the Respondent raised jurisdictional challenges regarding the name with which it was identified in the Notice of Arbitration and the effect of provisions in the Arbitration Clause allegedly requiring escalation.
21. On 25 July 2021, after the Preliminary Hearing, I issued “Order for Directions No. 1” reflecting the agreed matters.
22. Specifically, Order for Directions No. 1, dated 25 July 2021, set out:
- | | |
|-------|--|
| 22.1. | Parties agree that the substantial law applicable to the merits of the dispute are the laws of Northistan; |
| 22.2. | Parties agree that the seat of arbitration is Easthead; |
| 22.3. | Parties agree that UNCITRAL Rules 2013, as amended, apply by virtue of Sub-Clause 21.2 |
| 22.4. | Parties agree that the IBA Rules on the Taking of Evidence in International Arbitration, 2020, shall apply to this dispute. |
| 22.5. | All communications, statements, and evidence to be submitted to the other Party and to the Arbitrator via email to these addresses: dara@ngambilaw.co.ea , Chloe Burns of 5 th Chambers Northampton, and Abdullah Rahmanovich of Rahman Law Southsea. |

- 22.6. Claimant to submit its Statement of Claim on or before 01.10.21.
 - 22.7. Respondent to submit their Reply to Statement of Claim and Defence on or before 01.11.21.
 - 22.8. Claimant to submit Statement of Response to Counterclaim by 01.12.21.
 - 22.9. Cut-off date for submission of evidence set as 06.01.22
 - 22.10. Written witness statements due 10 January 2022.
 - 22.11. Hearing and oral testimony of witnesses to take place from 10 January 2022 to 13 January 2022.
23. Prior to the Hearing, the Parties were to pay an advance on my fee, to be paid equally by each party in advance of the Preliminary Meeting.
24. The Pre-Hearing meeting was held on 8 January 2022, where arrangements to have summing up rather than closing statements, and for closing statements be given in the form of Post Hearing briefs along with costs sheets. An agreement was made on the structure of the hearing.
25. In accordance with the Order for Directions No. 1, a hearing was held on 11 January 2022, 12 January 2022, and 13 January 2022. The Claimant was represented by Chloe Burns as counsel and Jacob Tarens as company representative. The Respondent was represented by Abdullah Rahmanovich as counsel and Marco Pryon as company representative. The hearing was completed within the four allocated days and I thank the parties and their representatives for the efficacy with which the hearing was conducted.
26. I shall deal with the evidence given before me below, but I shall here record the evidence received at the hearing:
- 26.1. The Claimant called the following witnesses, who attended for cross-examination upon their statements and expert reports respectively, exchanged in accordance with Procedural Order No. 1:
 - 26.1.1. Jacob Tarens, Managing Director
 - 26.1.2. Mary Bell, Secretary to Jacob Tarens
 - 26.1.3. Evan Llywd, expert in delay damages and commercial financing
 - 26.2. The Respondent called the following witnesses, who attended for cross-examination upon their statements and expert reports respectively, exchanged in accordance with Procedural Order No. 1:
 - 26.2.1. Marco Pryon, CEO
 - 26.2.2. Lesley Randal, Engineer

26.2.3. Jackie Jones, an expert in FIDIC type contracts.

27. As directed, the Parties had also lodged a bundle of agreed documents in advance of the hearing, which I had read prior thereto.
28. At the end of the hearing, I asked the parties and their representatives if they were content that they had been heard on all the issues in dispute and had made such submissions as they wished to make. This was confirmed and I declared the hearing closed UNCITRAL Rules Article 31.
29. Subsequent to the Hearing, Post Hearing Briefs (PBHs) were exchanged simultaneously on 12 February 2022, as agreed.
30. Detailed and itemized cost submissions were also submitted simultaneously on 12 February 2022, together with details of the settlement offers made between the Parties.
31. I then rendered this Award on 14 June 2022, terminating the arbitration proceedings according to the UNCITRAL Model Law. I ordered a 14-day grace period for payment of the Award by the unsuccessful Party, after which non-compliance interest will run as Awarded in the operative part of this Award.

THE BACKGROUND TO THE DISPUTE

32. I can now set out the facts in more detail. Where there are disputed facts, I shall indicate the Parties' respective positions. I shall then make the findings necessary to resolve the issues below.
33. The uncontroversial background to their dispute is as follows:
 - 33.1. The Parties entered into a contract (the "Contract") on 1 July 2020 under the laws of Northistan to build an electricity substation in Northistan. The contract was formally titled "Build Contract NISTN/40034/22". The Contract included terms for: the payment of an Advance Payment of N\$2,000,000; the payment of 48 monthly interim payment certificates of N\$500,000; the provision of design work by the Respondent; the construction of certain works by the Claimant; provisions concerning determinations, variations, the Contractor's entitlement to suspend work, and the Contractor's entitlement to terminate.
 - 33.2. The Respondent paid an advance of N\$2,000,000 to the Claimant upon the execution of the contract by the Parties on 1 July 2020. Mobilisation took place between 1 July 2020 and 31 July 2020, and work started on 1 August 2020.
 - 33.3. The Respondent provided design work to the Claimant. These designs were soon changed in ways that affected Tank Room No. 8.
 - 33.4. The Claimant notified the Engineer on 5 October 2020 of what it believed were problems with machinery fitting in Tank Room No. 8.

- 33.5. On 8 October 2020, the Claimant submitted a Value Engineering Variation request to the Engineer.
- 33.6. On 10 October 2020, the Engineer replied to the Claimant, saying that the Claimant was not responsible for design work and had to build as designed.
- 33.7. On 1 November 2020, the Claimant gave instructions to its team to proceed with changes to Tank Room No. 8.
- 33.8. On 3 November 2020, the Claimant wrote to the Respondent to explain its perspective on what had gone wrong, and to request N\$1,000,000 for what it claimed was reimbursement for its costs.
- 33.9. At some point soon after 3 November 2020, the Respondent relied to the Claimant, stating that the changes were unsolicited, and refusing payment or Variation order.
- 33.10. The Engineer refused to certify the Value Engineering Valuation at any time.
- 33.11. Starting on 23 January 2021, and for three further months on the 23rd, the Engineer certified IPCs submitted by the Claimant.
- 33.12. On or about 28 January 2021, the Respondent failed to pay IPC No. 5, and subsequently failed to pay IPCs Nos. 6, 7 and 8.
- 33.13. On 25 February 2021, the Claimant gave notice to terminate the Contract.
- 33.14. On 1 May 2021, the Claimant terminated the contract.
- 33.15. On 7 June 2021, the Claimant made an offer to the Respondent to settle the dispute for N\$3,000,000. The Respondent refused this offer, and threatened to cash the letter of credit.
- 33.16. 15 June 2021, the Respondent made a without prejudice settlement offer to settle the matter with the Claimant for N\$1,000,000. On 16 June 2021, the Claimant rejected this letter.
- 33.17. On 20 June 2021, the Respondent made another settlement offer for N\$1,500,000. On 1 July 2021, the Claimant rejected this offer.
- 33.18. On 1 July 2020, the Claimant filed a Notice of Arbitration in which the name of the Respondent was written as “Pyrontics Ltd, Northistan” three times, in the carbon-copy recipient list; in the body of the email; and in the table of contact details for the Parties. This was accompanied by an apparent misspelling of the name of the CEO of the Respondent; in the email this individual was identified as “Marco Pyro”, whereas in subsequent correspondence, this individual was identified as “Marco Pryon”.

- 33.19. As identified at the hearing, machinery would have to pass thorough the mezzanine and stairs and it would be impossible to fit it into the Employer's design.

THE CLAIMS

34. The Claimant seeks the following remedies:

- 34.1. A declaration that IPCs 5-8 were duly certified and are payable.
- 34.2. A total of N\$2,000,000 for the four unpaid IPCs
- 34.3. Interest on each IPC from the relevant due date for payment until the date the award is paid.
- 34.4. N\$ 1,000,000 for the costs of the changes made to Tank Room No. 8.
- 34.5. All costs in the dispute.
- 34.6. Any other damages the Tribunal sees fit.

35. The Respondent denies that the Claimant is entitled to the relief claim and seeks the following remedies:

- 35.1. A declaration that the works to Tank Room No. 8 were unsolicited and that no monies are due for these works.
- 35.2. A declaration that the Advance of N\$ 2,000,000 covers the four unpaid IPCs.
- 35.3. A declaration of no amounts to pay.

36. It is unclear whether the Respondent seeks costs. In a section prior to the section "Prayer for Relief", the Respondent writes, "All claims of the Claimant should be denied and all costs incurred by the Respondent in proceedings should be reimbursed to the Respondent." As written, this does not formally seek costs.

THE ISSUES BETWEEN THE PARTIES

37. The Parties agree on the uncontroversial facts enumerated and described above.

38. However, the Parties are not in agreement on the following facts:

- 38.1. Whether the Arbitrator has jurisdiction to hear the matter despite apparent flaws in the appointment process.
- 38.2. Whether the Respondent had the right to withhold payment on the IPCs due to the Claimant's purported breach of contract in undertaking works on Tank Room No. 8.

- 38.3. Whether it was necessary that works on Tank Room No. 8 needed to be accomplished in October and November 2020, or whether the Claimant had made changes to the work schedule.
- 38.4. Whether the Engineer responded to the Claimant's 5 October 2020 enquiry, and if so, how.
- 38.5. Whether the Claimant had given the Employer and Engineer sufficient time to investigate and do a cost analysis in regards to Tank Room No. 8.
- 38.6. Whether the Engineer paid enough heed to the Claimant's warnings to fulfil its obligations under Sub-Clause 4.4.
- 38.7. Whether the Advance Payment was consumed by Contractual works benefitting the Respondent or whether the Claimant purchased and appropriated to itself machinery (claimed to be worth N\$735,764).
39. As such, the issues between the Parties which fall to me to determine are as follows:
- 39.1. Whether the Tribunal has jurisdiction to hear the present matter despite the error in the name of the Respondent in the Notice of Arbitration.
- 39.2. Whether the Tribunal has jurisdiction to hear the present matter despite the Respondent's allegation that the Arbitration Clause requires that a Dispute Adjudication Board be constituted.
- 39.3. Whether IPCs are due and payable, and if so, whether the Advance Payment is capable according to the terms of the contract of being used to cover such IPCs.
- 39.4. Whether the Claimant's works regarding Tank Room No. 8 were properly undertaken, and if so, whether and to what extent they were compensable.

**PRELIMINARY DETERMINATION OF THE LAW GOVERNING THE
ARBITRATION AGREEMENT AND ARBITRATION PROCEDURE**

40. I must address what law it is that governs the arbitration agreement and thus the arbitration procedure, as the Parties have not made this clear. Per discussions held at the Preliminary Meeting on 25 July 2021, the parties agreed that there was not conflict as to the validity of the Contract or the Arbitration Agreement.
41. The Arbitration Clause provides, "*...all disputes arising out of or in connection with this Contract shall be finally resolved by binding arbitration on an ad hoc basis between the parties to this Contract, in Easthead under UNCITRAL Rules. A sole arbitrator will be appointed by the Easthead Arbitration Institute.*" It was confirmed at the Preliminary meeting held 25 July 2021 that the seat of arbitration was Easthead and that the substantive law of the contract was that of Northistan.

42. It is trite law that the UNCITRAL Model Law (Article 20) and the UNCITRAL Rules (Article 18) use the term “place” to mean what other legal systems call “seat”. In the present matter, the Parties have confirmed that the “seat” of the arbitration shall be Easthead. The text of Article 20 makes it clear that the juridical seat of the arbitration is not necessarily where the proceedings physically take place, which is irrelevant to the present matter.
43. Furthermore, it is trite law that the law of the seat applies to the determination of the validity of the parties’ agreement to arbitrate and, therefore, the jurisdiction or basis of the entire procedure.
44. UNCITRAL Model Law, Article 16, and UNCITRAL Rules Article 23, grant the tribunal the competence to rule on its own jurisdiction. This is a natural consequence of the doctrine of separability, also contained in these articles. Article 16 provides, “*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*” The consequence of this is that the law governing the arbitration agreement may be different than the substantive law governing the contract, which in the present case is the law of Northistan.
45. Although the decisions of the courts of England and Wales are not directly applicable to the present matter, they are capable of describing general principles applicable to international arbitration. Furthermore, Article 2A of the UNCITRAL Model Law promotes uniformity of application. In *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638, the Court of Appeal explicated this concept, finding that absent express or implied choice by the parties, the law governing the arbitration agreement was the law with the closest and most real connection to arbitration agreement, which it considered a contractual provision concerned with procedure; the Court of Appeal also considered the law of the seat to be the one most closely associated with procedure, cf. the substantive law of the contract. The Court of Appeal therefore concluded that the law governing the arbitration agreement was the law of the seat.
46. The present matter strongly parallels *Sulamerica*. The Parties are incorporated in Northistan and Southland and the contract was performed in Northistan, and yet they have chosen Easthead, a neutral jurisdiction, as the seat of arbitration. Furthermore, they have chosen the EAI as their appointing authority, creating further procedural ties between the arbitration and Easthead. Finally, the subject matter of the contract was construction, not the law of real property, and thus not subject to the law of real property where that real property is located.
47. It should therefore be concluded that the law governing the arbitration agreement and the arbitration proceedings is the relevant arbitration law of Easthead. Although this statute has not been named to me, I have been told that it incorporates the UNCITRAL Model Law.
48. Pursuant to this conclusion, I find that the competent court described in Article 6 of the UNCITRAL Model Law must be the courts of Easthead.

49. The conclusion that the law of Easthead is the law governing the arbitration clause is bolstered by the citation of *Grantham and Forbes, 1824, ESC1/22/24* by the Respondent in regards to a procedural matter at the hearing held on 13 January 2022; this citation, for this purpose, was not contested by the Claimant.
50. Article 19 of the UNCITRAL Model Law states that, “*the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*” Pursuant to the Arbitration Clause, the Parties have agreed that UNCITRAL Rules shall apply. Furthermore, pursuant to their agreement at the Preliminary Hearing, the Parties have agreed to adopt the IBA Rules of Evidence.
51. Article 1(1) of the UNCITRAL Rules provides for their general applicability. However, the application of the UNCITRAL Rules is the fount upon which the selection by the Parties of the IBA Rules of Evidence is founded, and the application of the IBA Rules of Evidence is therefore subject to the fulfilment of the provisions of the UNCITRAL Rules.
52. The UNCITRAL Rules, Article 1(3) provide, “*These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.*”
53. This issue is relevant, if inconsequential, in regards to the New Evidence the Claimant sought to introduce at the hearing on 11 January 2022, the introduction against which the Respondent sought to argue by citing the authority of the Easthead Supreme Court. As described below, the conclusion of the Easthead Supreme Court in *Grantham and Forbes* parallels the requirements of the IBA Rules of Evidence, Article 9(2)(b). *Q.v. sub.*

PRELIMINARY ISSUE ON JURISDICTION REGARDING NAME OF RESPONDENT

54. On 1 July 2021, the Claimant’s representative, Chloe Burns, sent to Jean James, Secretariat of the EAI and the representative of Respondent, identified at that time as “Marco Pyro, CEO Pyrontics Ltd” a Notice of Arbitration in which the Respondent was identified as “Pyrontics Ltd, Northistan, Registered Number SL23332, Hertha Ayrton Towers, Southsea, Southland, 25345”.
55. In my email on 6 July 2021 to the EAI, I stated that I had been unable to find Pyrontics Ltd in the Southland Companies Register², but that I had found Pryontics at the same address, and stated I assumed this was a typographical error. On 12 July 2021, the EAI wrote to me acknowledging the error, stating, “*Thank you for pointing out the error in the Respondent’s Company name, we have corrected it for our records.*”
56. On 15 July 2021, in response to my email earlier that day acknowledging my appointment as arbitrator, Marco Pyron wrote to me, opposing counsel, and the Secretariat of the EAI, stating that his lawyer had informed him that the arbitration tribunal had not been properly

² In this email, I myself committed a typographical error by referring to this as the “Southhand Companies Register”.

constituted due to, *inter alia*, the error in the name. He acknowledged that Jacob Tarens, CEO of the Claimant, had jokingly nicknamed him “Pyro”.

57. In this communication Mr Pyron stated that my time had been wasted. I interpreted this as a denial of my appointment.
58. In response, on 15 July 2021, I replied to this email to state that, since I had been appointed as arbitrator, I would deal with this under my authority as given in the rules and the law, giving the Respondent ample opportunity to state any objections to my jurisdiction.
59. It is undisputed that, at the Preliminary Meeting held 25 July 2021, the Respondent objected to the jurisdiction of the Tribunal, *inter alia*, because the Notice of Arbitration was written in the name of Pyrontics Ltd, which was an error and should be Pryontics. I invited the Respondent to give its jurisdictional objection in writing and noted that I would make my decision on it in due course.
60. At the same Preliminary Meeting, counsel for the Claimant expressed that it had been a typographical mistake since, as Mr Pryon had noted in his 15 July 2021 email, Mr Pryron had been referred to as Mr Pyro and that the name had been recorded incorrectly on the Claimant’s internal files. Counsel for the Claimant argued that this typographical error was not sufficient to derail the arbitration and noted that the address and registration number for the company had been given correctly in the Notice of Arbitration. Counsel for the Claimant further noted that even if there had been a critical error in the Notice of Arbitration, the Respondent could not rely on an error in the Notice of arbitration to slow down or suspend the arbitration under UNCITRAL Rules, and that it was a matter for the arbitrator to decide his or her jurisdiction.
61. In the Claimant’s Particulars of Claim, dated 1 October 2021, the Claimant referred to the Respondent by its proper name, Pryontics Ltd.
62. In the Respondent’s Defence and Counterclaim, dated 1 November 2021, the Respondent argued, “*The Claimant’s Notice of Arbitration dated 01.07.21 is not a valid Notice of Arbitration in that it fails to include all matters necessary for a valid Notice of Arbitration as required by Article 3 paragraphs 3 to 4 of the UNCITRAL Arbitration Rules, specifically that the NoA was written in the name of Pyrontics Ltd, and not the correct name of Pryontics Ltd. Consequently, the arbitral tribunal has not been correctly constituted and the arbitrator lacks the jurisdiction to proceed in this arbitration.*”
63. In the Claimant’s Reply dated 1 December 2021, the Claimant argued, “*To rely on the typographical error in the NoA to insist that the entire arbitration is void, is ludicrous.*”
64. This jurisdictional issue does not appear to have been addressed in the Hearing held in January 2022.
65. As a preliminary determination, the Respondent has complied with the requirements of Article 23(2) of the UNCITRAL Rules by raising its jurisdictional challenge in the Preliminary hearing and Defence and Counterclaim.

66. Article 23(1) of the UNCITRAL Rules provides, “*The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*” This grants me the power to rule on my own jurisdiction in this matter.
67. Article 3(2) provides, “*Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.*”
68. Article 3(3) of the UNCITRAL Rules provides, “*The notice of arbitration shall include the following: [...] (b) the names and contact details of the parties...*” (emphasis added).
69. The examination of arguments not explicitly argued before a tribunal is undertaken at best sparingly; the parties must be given the opportunity to address such arguments. However, a tribunal that does not consider the law as it exists is, tautologically, lawless. In a recent article regarding English law but expressed to contain principles of universal application, Simon Crookenden QC³ argues that cases where (a) the mistake was obvious or not such as to cause any reasonable doubt; or (b) where an agency relationship exists (e.g., as between members of a corporate group), rectification of a mistake as to the name of a party is justified.
70. In the present case, both criteria are fulfilled. The mistake in the present case is obvious, as it involves the mere transposition of two letters. Given that the Claimant correctly identified the address, jurisdiction of incorporation, registered number, and address – rendering the error easily discoverable by me – the mistake cannot cause any reasonable doubt. Furthermore, it is clear that Mr Pryon had, with whatever disdain, clearly acceded the role of agent for the Respondent under this nickname, such that the email address identification by the Claimant’s email client rendered him by this nickname automatically; its use as established by the Parties’ earlier relationship was not improper.
71. Although Article 3(3) states that the “*name*” of the Respondent must be provided, this word must be read together with Article 3(2); there is no dispute that the Respondent received this Notice of Arbitration on 1 July 2021. The purpose of Article 3(3) is to ensure certainty in arbitral proceedings, a purpose accomplished by the Claimant’s Notice of Arbitration. As the purpose of Article 3 has been fulfilled, this jurisdictional challenge must be dismissed.
72. Finally, Article 3(5) of the UNCITRAL Rules provides, “*The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.*” The Rules not explain whether such hindrance be legal or factual in nature.
73. It is of considerable concern that the representative of the Respondent took it upon himself to email me and the other concerned Parties on 15 July 2021 to deny my jurisdiction to hear this dispute; such behavior violates both the letter and the spirit of Article 3(5), which is relevant to costs determination.

³ Simon Crookenden, “Correction of the Name of a Party to an Arbitration” (2009) 25(2) *Arbitration International* 207

PRELIMINARY ISSUE ON JURISDICTION REGARDING ARBITRATION CLAUSE

74. The Parties have provided me with the full text of the Arbitration Clause, which reads in relevant part:

21.1 If the Parties agree to constitute a Dispute Board, and the Dispute Board fails to render a decision within 100 days of the constitution of the Dispute Board, either Party may initiate arbitration.

21.2 Provided that no Dispute Board has been constituted, or that the Dispute Board has failed to render its decision within 100 days of constitution, all disputes arising out of or in connection with this Contract shall be finally resolved by binding arbitration on an ad hoc basis between the Parties to this contract, in Easthead under the UNCITRAL Arbitration Rules.

75. The Respondent argues this means that the parties agreeing to a Dispute Board is a prerequisite to arbitration. The Claimant underlines the start of sub-clause 21.2, which states, “provided that no Dispute board has been constituted” to show that the Arbitration Clause envisages that the Parties have the option, but not the obligation to constitute a dispute board in advance of an arbitration.
76. A condition precedent is an event which must occur, unless its non-occurrence is excused, before performance under a contract becomes due, i.e., before any contractual duty arises. For a tribunal to determine that it lacks jurisdiction in the arbitration due to failure of a condition precedent, it must be clear from the wording of the arbitration agreement that the pre-conditions are not merely permissive or non-mandatory.
77. The determination of this issue turns on linguistic analysis, and the analysis put forward by the Claimant is persuasive. The words “*Provided that no Dispute Board has been constituted...*” indicates that the non-constitution of a dispute board allows a party to bring arbitration; this implies that the constitution of a dispute board is permissive.
78. It is in this light that Clause 21.1 must be read. “*If the Parties agree to constitute a Dispute board...either Party may initiate arbitration,*” describes one route to arbitration. There is no basis for reading in the words, “*If and only if the Parties agree to constitute a Dispute Board...*” The maxim of interpretation, “*expressio unius, exclusio alterius*” simply does not apply in the present case, as not only “one” has been expressed.
79. The alternative suggested by the Respondent leads to absurdity; if agreement, at a Party’s discretion (as indicated by the word “*if*”), to constitute a Dispute Board, were a prerequisite to bringing arbitration, a Party would be able to avoid the consequences of non-performance of its contract simply by refusing to agree to constitute a Dispute Board.
80. This jurisdictional challenge must therefore be dismissed.
81. Given the obvious consequence of the words, “*Provided that no Dispute Board has been constituted...*” and the absurdity of the interpretation put forward by the Respondent, it

cannot automatically be concluded that this jurisdictional challenge was brought in good faith. This will be examined when costs are considered.

**EVIDENTIAL ISSUE CONCERNING ADMISSIBILITY OF DOCUMENT
DISCOVERED BY CLAIMANT**

82. On the second day of the hearing, 11 January 2022, the Claimant asked to enter into evidence a document it had discovered on a flash drive that the Respondent had given it on which to save the hearing bundle. The Claimant stated the document had been produced by the Respondent's lawyer discussing whether both the Advance and the IPCs could be claimed. I stopped the Parties at this point and asked that no further information be disclosed about the document. I instructed the Parties to make their submissions on the admission of this document into evidence by 9 AM the next morning, 12 January 2022; I limited written submissions to 1,000 words and heard oral arguments between 9 and 10 AM that day.

83. The Claimant's position was that the document was evidence probative of the Respondent's bad faith in claiming that the Advance could be set off against the IPCs. The Claimant quoted the IBA Rules regarding admissibility of probative evidence.

84. The Respondent argued, firstly, that the document was protected by legal privilege under the Easthead Supreme Court decision *Grantham and Forbes, 1824, ESC1/22/24*; and secondly, because the document was obtained without the Respondent's permission. The Claimant argued against this, stating that it had been freely given without supervision or instruction as to its use.

85. Article 9(1) of the IBA Rules of Evidence grants the tribunal the power to “*determine the admissibility, relevance, materiality and weight of evidence.*”

86. However, Article 9(2)(b) provides,

“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document statement, oral testimony or inspection, in whole or in part, for any of the following reasons: [...]

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.

87. Article 9(4) provides,

In considering issues of legal impediment or privilege under Article 9(2)(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;

[...]

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

88. As the respondent have helpfully cited to me, the Easthead Supreme Court, in *Grantham and Forbes*, 1824, ESC1/22/24, stated, “*the relationship between a lawyer and his client is protected. It is imperative that they are able to speak freely without fear of these words being used in evidence.*”
89. As I have stated above, UNCITRAL Rules Article 1(3) require that they be applied, and thus the IBA Rule of Evidence be applied, unless they are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate.
90. In the present matter, the procedural law of Easthead applies, and in my reading the result in *Grantham and Forbes* expresses a fundamental principle of the procedural law of Easthead, from which the Parties cannot derogate.
91. However, it is clear that the holding in *Grantham and Forbes* and the requirements of the IBA Rules of evidence present no conflict; both reflect the principle privileging the confidentiality of legal communications found throughout the world. Parties to arbitration proceedings must be free to communicate candidly with their legal advisors.
92. It is clear from the present circumstances that the Respondent did not wish to disclose this document to the Claimant, and that such disclosure was inadvertent and unintentional. Prohibiting the admission of this document into evidence would uphold the confidentiality, and thus candour, with which the Respondent and its legal counsel corresponded.
93. The document discovered by the Claimant must therefore be held inadmissible. This tribunal refuses to admit it into evidence.

CONTRACTUAL ISSUE ON THE LIABILITY REGARDING IPCS 5-8 AND THE ADVANCE PAYMENT

Introduction

94. The present case concerns two distinct substantive matters: (1) whether the Respondent owed sums were due on IPCs 5-8, and if so, whether the Respondent is entitled to a declaration that the advance of N\$2,000,000 could cover the sums owing; and, (2) whether the Respondent is liable to the Claimant for the sums of money the Claimant expended in works on Tank Room No. 8.
95. These two issues must not be conflated. The issue of the IPCs and the status of the Advance Payment will be addressed in this section. The issue of Tank Room No. 8 will be addressed later in this award.

96. As a roadmap, this section will show that the Respondent owed monies under IPCs 5-8, and was not entitled to withhold payment on them. Because the Respondent improperly withheld payment, the Claimant was entitled to terminate the Contract; the Claimant exercised this validly, and the Respondent has not disputed the validity of the Claimant's termination of the Contract. Although the Advance Payment was issued by the Respondent to the Claimant in the form of a loan, the Advance Payment was not simply a loan to cover the operations of the Claimant, but rather to provide cash-flow during the mobilization of the works, expenditure of which value accretes to the Contract, depleting the value owing on the Advance Payment. Because the Respondent received the benefit of the Advance Payment, the sums advanced under the Advance Payment were accreted to the Contract and thus are not to be repaid. The Respondent is therefore not entitled to a declaration that the Advance Payment covers the four unpaid IPCs.

IPCs 5-8 are Due and Payable

97. Sub-Clause 14.2 of the Contract provides *"The Employer shall pay N\$500,000 on or before the 28th day of each calendar month on submission of duly certified IPCs before the 23rd day of that month."* This creates a payment obligation for the Employer.

98. Sub-Clause 14.4 provides, *"The Contractor will make an application for an Interim Payment Certificate (IPC) on 20th day each month, along with all supporting documents. The Engineer shall determine and certify the IPC on the 23rd day of that month, as long as all conditions have been met. Payment of the IPC will be made by the Employer at the latest on the 28th day of that month."*

99. The Engineer of Pryontics, Lesley Randal, has stated that she certified IPCs 5-8. In her statement, she wrote, *"[Work on Tank Room No. 8] did delay other scheduled works but they managed to get back on schedule before the IPC [#5] was due.... The Employer was livid [when she told him of the work on Tank Room No. 8] and told me not to certify the IPCs for anything to do with Tank Rooms 5-9. I didn't certify the Value Engineering Variation retrospectively of course but the works noted in IPC 5 had nothing to do with the Tank Room, were correct, and I duly certified it. Same with the subsequent ones until the Contractor terminated the works."*

100. The CEO of Pryontics, Marco Pryon, writes, *"I mean, yes, things were tight with the funding being pulled, but we would have found other sources of funding, I didn't think that was a problem No, of course we stopped payment because of the works they did without permission."*

101. Neither the Respondent nor the Claimant has adduced evidence that the IPCs were improperly claimed or certified. On this point, Jacob Tarens, Managing Director of the Claimant, stated, *"they paid...the first few IPCs, then suddenly bang, they just stopped paying with no reason and no context. No explanation of when payments would start again."*

102. The Respondent, in its Defence and Counterclaim, admitted, *"The Respondent ceased payment because the Claimant did unsolicited works to, and around, Tank Room 8 and an investigation was ongoing as to whether the works were necessary and how to deal with the*

issue,” but has cited no provision in the Contract that would entitle it to withhold payment for the IPCs on this basis or any other. As long as they were properly claimed and certified, the Respondent’s financial obligation to pay on them was engaged. Although there was discord between the Parties as to the works on Tank Room No. 8, such does not entitle the Respondent to withhold payment on the IPCs. Indeed, it appears that the emotional reaction of Mr Pryon to issues related to Tank Room No. 8, and possibly the financial difficulties Pryontics was experiencing, induced him first to instruct the Engineer not to certify the IPCs (in breach of her own duties) and then to retaliate by withholding payment. Such provides no grounds upon which to withhold payment on the IPCs.

103. I therefore declare that IPCs 5-8 were duly certified and are payable.

Respondent in Breach due to Non-Payment of IPCs 5-8, Entitling the Claimant to Terminate the Contract

104. Clause 16 of the Contract provides for a mechanism by which the Contractor may suspend work and may terminate the Contract due to non-payment by the Engineer.

105. Clause 16.2 provides:

“The Contractor shall be entitled to terminate the Contract if: [...]

(c) the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the due date. [...]

In any of these events or circumstances, the Contractor may, upon giving 14 days’ notice to the Employer, terminate the Contract.

106. Interpreting this, it must be noted that the Contractor was not required to give notice of termination 42 days after expiry of a due date, but rather was entitled to terminate. The Contractor was only required to give notice 14 days before that day, even if the right to terminate would only accrue on that day. There is nothing illegitimate about sending a notice before the right accrued; indeed, to require that the right to terminate accrue before a notice could be sent would defeat the right to terminate itself. *“In any of these events or circumstances”* must therefore be read to include *“In anticipation of any of these events or circumstances,”* to give effect to the right to terminate.

107. In its Particulars of Claim, the Claimant writes at [8], *“The project finally fell apart after only 4 months because the Employer failed to pay IPC number 5 on the due date of 28.01.21 and then continued to fail to pay the subsequent IPCs. The Claimant duly gave notice to terminate the contract on 25.02.21 and terminated the contract on 01.05.21 after month 8 and 4 non-payments of the IPCs 5 through 8.”*

108. 42 days after 28 January is 11 March 2021. 14 days before 11 March 2021 is 25 February 2021. The Claimant therefore followed the procedure of Clause 16.2 without error.

109. To be sure, the Claimant waited until 1 May 2021 to terminate. There was nothing improper about this; the Claimant had given the Respondent 65 days' notice, which necessarily implies that the Claimant had given the Respondent 14 days' notice.
110. The Respondent has not disputed the validity of the Claimant's termination. The Contract was validly terminated on 1 May 2021.
111. Regarding causation and liability, the relevant right to terminate under Sub-Clause 16.2 is contingent on an unremedied breach by the Employer of its payment obligations. All other events, even those that may or may not give the Employer the right to terminate, are irrelevant and immaterial to a finding of causation and liability.
112. It is clear that the Claimant validly exercised its right to terminate the Contract under Sub-Clause 16.2. That right is created when there has been a breach by the Respondent of its payment obligations. The Respondent did not seek to terminate the contract and has not put forward any argument as to an entitlement to do so. The Respondent has merely accepted the validity of termination pursuant to Sub-Clause 16.2, and thus the Respondent must be taken to have accepted the factual allegations giving rise such a valid termination.⁴ The Respondent's statement in its written submissions, "*I would note that the project failed at quite an early state in month 8 of 24 and only very basic building work had been achieved by that time,*" has no bearing on the factual question as to whether the Advance Payment had been consumed, nor any bearing on issues of liability, viz., whether it had been validly consumed. The Respondent simply got what it bargained for.

The Nature of an Advance Payment

113. The Claimant argues in its Particulars of claim, "*The payment terms were agreed as an advance of N\$2,000,000 for the one-month mobilization, and then 48 x monthly IPCs of N\$500,000 to a total of N\$26,000,000 over the life of the 4-year project.*" In its Reply the Claimant states, "*The advance was a sum of money for mobilization to start the work.... The Claimant has the right to both the Advance and the IPCs.*" Jacob Tarens, Managing Director of the Claimant, stated in his witness statement, "*This whole thing about the Advance though was really nonsense. Everyone can tell you the Advance is a separate payment for mobilization and non-refundable.*"
114. The Respondent argues in its Defence and Counterclaim, "...*the Claimant has no case because...the Advance covers any outstanding IPCs.*" In its written submissions, it claims, "*The advance is specifically described in the contract as being an interest free loan to the Contractor. As such, it is payable if the project fails for any reason.*" However, Jackie Jones, Party Expert for Pryontics (whose testimony will be considered substantively below), states, "*I have done a forensic accounting of the monies in the Advance and have concluded that when the Contractor left the site it took with it machinery of the value N\$735,764 that it did not own at the beginning of the project. This would indicate that at least N\$735,764 of the*

⁴ Lord Atkins, in *Bell v Lever Brothers Ltd* [1931] UKHL 2, writes, "*The contract released is the identical contract in both cases: and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way: or that if he had known the true facts he would not have entered into the bargain.*"

N\$1,000,000 was of benefit to the Contractor.” These two statements indicate conflicting theories of the nature of the Advance Payment; whereas the Respondent, in the Defence, evinces a theory that the Advance Payment is merely a store of money to be repaid to it, the Party Expert appears to acknowledge that sums spent from the Advance Payment to the benefit of the Respondent accrete to the Contract.

115. Clause 14.1 of the Contract provides, “*Advance Payment. The Employer shall make an advance payment, as an interest-free loan for mobilization, of N\$2,000,000, when the Contractor submits a guarantee in accordance with this Sub-Clause on or before 15.07.2022.*”
116. It has been suggested that the Contract between the Parties has, at a minimum, been inspired by the standard-form FIDIC contract. Indeed, the language contained in Clause 14.1 resembles language found in Clause 14.2 of the 2017 FIDIC Silver Book standardized contract. However, the language of the Contract lacks any mention of repayment terms and schedule. To be sure, I have been provided only excerpts from the Contract.
117. How then is this clause, stripped bare of repayment terms, to be read? Sub-Clause 14.1 merely states, “*The Employer shall make an advance payment, as an interest-free loan for mobilization....*”
118. The purpose of an Advance Payment in a FIDIC contract is to provide a contractor sufficient liquidity, i.e., cash flow, in order to mobilise its resources and commence work on a project. As the purpose of the Advance Payment is to provide the Contractor cash flow (i.e., to maintain its outflows), monies expended from the Advance Payment are necessarily to the benefit of the Employer. In all editions of FIDIC contracts, this Advance Payment is then “repaid” over the course of the project in installments. Whereas in the Red and Yellow books, it is repaid by a system of certificates, in the Silver book, it is “repaid” out of funds owing to the contractor, i.e., the IPCs.
119. However, this “repayment” is merely an accounting device. In reality, where an Advance Payment has been paid, the values of the IPCs are correspondingly lowered. This reflects a repayment schedule, where the Advance Payment is repaid at a steady rate. Indeed, although the language of “interest-free loan” might be used, it is entirely possible that a schedule of IPCs might simply reflect the repayment without a need to mention it.
120. Furthermore, a repayment schedule is merely an amortisation schedule whereby the initial Advance Payment is written off over the course of the project. It is in this way that accounting practice and reality diverge; it could well be the case that the entire Advance Payment is consumed in ways that benefit the Employer early in a project. Indeed, the presumption apparent in the Contract that the deductions from the IPCs correspond to the actual consumption of portions of the Advance Payment, is weak at best, and readily rebutted with actual evidence; it is virtually impossible that the Advance Payment would be consumed at a steady rate, given the vagaries of a complex construction project.
121. It is for this reason that the characterization put forward in the Respondent’s Defence must be rejected out of hand; if the entire sum of money would need to be repaid, presumably

upon completion of the Project or issuance of a Certificate of Completion, that the Contractor would receive a windfall in the form of the time-value of the money over the course of the Project, greater than the time-value of the money the Employer would receive had the Advance Payment been repaid in installments over the course of the Project (assuming, as we must, that the Employer expected the Project to be completed). In other words, this is a commercially absurd interpretation of the Advance Payment term. This absurdity is compounded by the requirement of an Advance Payment Guarantee, procured by the Contractor, unchanging in size over the course of the Project, on commercial terms profitable to the bank or other guarantor providing the Guarantee, who would therefore capture that time-value from the Contractor. Why would an Employer transfer that time-value to the guarantor, when it could require the Contractor simply to take out a loan from a bank?

122. Furthermore, the Respondent's characterization flies in the face of commercial practice. In reality, advance payment guarantees are themselves reduced in value, and payments of profits representing interest are correspondingly reduced in value, over the course of the Project. The Employer does indeed transfer some time-value to the Contractor and guarantor, but in ever-decreasing amounts as the Project progresses and the Contractor's cash flow is restored after mobilization.
123. The characterization put forward by the Claimant and Mr Tarens is an incomplete "projection"⁵ of the more complete nature of the Advance Payment. If the project is completed, then there should be no Advance Payment to repay, as it has been amortised over the course of the Project. However, if the project is not completed, then the deductions from the IPCs may not represent the actual amounts of Advance Payment consumed in the partially completed Project. The Claimant's claim that it is *a priori* entitled to the entirety of the Advance Payment must also be rejected as conceptually flawed; the Advance Payment was indeed a loan, not a separate payment for mobilization.
124. However, the legal authority put forward by the Claimant, *Kierste and Bekir, 2014, NCA/99/2014*, confirms the analysis above, wherein Honourable Judge Abdul Brakier stated, "*Where a project fails before it is completed, the Advance should be proportioned as to what has benefitted the Employer.*" This Northistan judgment is applicable to the substance of the dispute.
125. The characterizations put forward by the Claimant's expert witness and the Defendant's expert witness evince the same, correct, interpretation of the nature of the Advance Payment, though they differ as to the degree to which the Advance Payment in the present case has been consumed (addressed below). Each addresses the question as to the degree to which the Advance Payment has been applied to the Project, and thus the Respondent.
126. It is for this reason that I must use my powers of rectification to rectify the present Contract. It is clear, by virtue of the fact that it lacks any mention of repayment terms or time-frame, that it lacks all terms agreed by the Parties as to the nature of the Advance Payment. Adopting the most conservative interpretation of the Parties' intention, evinced by their neglect to put a repayment schedule into their contract, it is clear that the monthly sums

⁵ In the geometrical sense that a circle is a projection of a sphere onto two-dimensional space.

of the IPCs in Clause 14.2 reflect sums that have already been adjusted to take account of repayment of the Advance Payment.

127. In the alternative, I must use my powers of interpretation of this Contract to identify an implied term in this contract. In *Equitable Life Assurance Society v Hyman* [2000] UKHL 39, which it is argued is of general application, the House of Lords of the United Kingdom found that a term needs to be implied when it is necessary to give effect to the reasonable expectations of the contracting parties. In light of this Contract's inspiration from the FIDIC contracts and the commercial absurdity of the Respondent's interpretation on a bare reading of the words of the contract, it is necessary to imply a term to the effect that the monthly sums of the IPCs in Clause 14.2 reflect sums that have already been adjusted to take account of repayment of the Advance Payment.
128. At the same time, it is necessary to imply a term that repayment of unconsumed Advance Payment is accelerated upon early termination of the Contract. Upon termination, the Employer derives no benefit from supporting the cash-flow of the Contractor, and would lose the time-value of this money if it need not be paid back immediately; even a schedular repayment would lead to commercial absurdity.
129. I therefore hold that the Advance Payment may not, in principle, be used to cover the outstanding IPCs; should it be found that not all of the money advanced under the Advance Payment has been consumed and accreted to the Contract, that money may be used to pay unpaid IPCs by way of set-off.

Evaluation of Expert Reports regarding Consumption of Advance Payment

130. Two factual accounts as to the consumption of the Advance Payment have been presented: the first from Evan Llywd, party expert for the Claimant; the second from Jackie Jones, party expert for the Respondent.
131. From the outset, I must make it clear that I have been presented with only two factual assertions as to the degree to which the Advance Payment has been consumed to the benefit of the Respondent. It is not open to me to "split the difference". Article 28 of the UNCITRAL Model Law and Article 35 of the UNCITRAL Rules both provide, "*The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.*" The Parties have not granted me this power.
132. Article 27 of the UNCITRAL Rules provides:
1. *Each party shall have the burden of proving the facts relied on to support its claim or defence.*
 2. *Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.*

[...]

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

133. Evan Llywd, for the Claimant, stated, *“I have done a forensic accounting of the use of the Advance and find that the Advance was used entirely for the benefit of the Employer, and as such, the Advance should be considered as part of the due amounts in addition to the IPCs.”* The phrase “due amounts” is perhaps unfortunate, but it is clear that Mr Llywd meant that the value of the Advance Payment was due to the Claimant; as it had already been paid to the Claimant, it of course need not be paid again.
134. Jackie Jones, for the Defendant, stated, *“I have done a forensic accounting of the monies in the Advance and have concluded that when the Contractor left the site it took with it machinery of the value N\$735,764 that it did not own at the beginning of the project. This would indicate that at least N\$735,764 of the N\$1,000,000 was of benefit to the Contractor.”*
135. At the time of the hearing, I noted that the Respondent’s expert opinion was submitted to the parties, but the Claimant did not make any comment on this matter. In the Hearing, I asked Claimant’s counsel if they would like to comment and received the answer, *“I have no instructions on this point.”* I looked at the Claimant Party but there was no answer and I continued the Hearing.
136. Article 5 of the IBA Rules concerns Party-Appointed Experts, and requires that an expert report be accompanied by *“a description of his or her background, qualifications, training and experience.”*
137. Article 9 of the IBA Rules provides, *“The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.”*
138. None of the experts’ testimony is entirely satisfactory:
 - 138.1. I have no explanation why Claimant’s counsel had no instructions regarding the issue of the machinery;
 - 138.2. I have no explanation why the Claimant did not provide instructions to its counsel during the Hearing;
 - 138.3. Ms Jones is described as an expert on FIDIC contracts, and nothing indicates she was qualified to undertake forensic accounting;
 - 138.4. The testimony of Mr Llwyd is vague;
 - 138.5. The Respondent appears to have claimed exceptional costs, at least in part attributable to its expert witness.
139. I must therefore decide whose testimony I find more credible.

140. On balance, I find the testimony of Mr Llwyd more credible.

140.1. Most importantly, Mr Llwyd is described as “*an expert in delay damages and commercial financing*”. Ms Jones is described as “*an expert in FIDIC type contracts*”, which appears to make her qualified to consider liability, but not quantum, and makes her as qualified as I am to undertake forensic accounting. In other words, Ms Jones does not appear to have the training necessary to undertake forensic accounting; her testimony is fruit from a less-healthy, if not poisoned, tree.

140.2. Although costs at least in part attributable to Ms Jones are exceptional and unexplained, I find that this has no bearing on her credibility.

140.3. Although Mr Llwyd’s conclusion may be vague, I attach no importance to the apparently exact figures Ms Jones produces; indeed, considering a rhetorical strategy appealing to *logos*, the use of supposedly exact figures can exert a powerful psychological attraction of which it is best to be sceptical. Without corroborating evidence, Ms Jones’s account is just as vague Mr Llwyd’s.

140.4. No rule of evidence allows me to make an adverse inference from the silence of the Claimant during the Hearing. It is clear that the Claimant’s expert witness had already addressed the issue of the consumption of the Advance Payment in his expert report. Although counsel stated it had no instructions, it is clear that the Claimant had already provided an answer to this assertion by the Respondent. Any number of explanations for this event is possible: counsel may have forgotten, however temporarily, that this point had been addressed in Mr Llwyd’s report; lay representatives for the Claimant may not have been following proceedings carefully and may not have understood what was happening; or they may have not understood that my gaze was an instruction for them to give counsel instructions. Indeed, it may have been the case that the figures presented by Ms Jones were so disconnected from reality that the Claimant’s representatives did not know how to answer them.

141. On balance, I believe the testimony produced by Mr Llwyd is more credible than that of Ms Jones. My principal reason for concluding this is that Mr Llwyd is qualified to undertake forensic accounting, whereas Ms Jones does not appear to be. Ms Jones’s written testimony simply cannot be characterized as an “expert testimony”.

142. The testimony produced by Mr Llwyd is therefore approved.

Conclusion: The Respondent May Not Use the Advance Payment to Cover Sums Owing on IPCs 5-8

143. The elements described above must now be assembled:

143.1. IPCs 5-8 were validly claimed and certified, and thus owing.

143.2. The Claimant validly terminated its Contract, and should not suffer any prejudice from this.

- 143.3. The Advance Payment was an interest-free loan for the purpose of supporting the cash flow of the Claimant during the initial stages of the Project. As the Advance Payment was to be amortised, in principle it was not available to cover unpaid IPCs, though sums not consumed could be employed via set-off for that purpose.
- 143.4. The Advance Payment was to be amortised over the course of the 48 months of IPC payments, which, by way of a necessary implied term, had been reduced to reflect that repayment.
- 143.5. The amortization of the Advance Payment was a (fictional) accounting technique based on the expectation that the Project would be completed. Analysis of the consumption of the Advance Payment is instead a factual inquiry.
- 143.6. On balance, the assertion by Mr Llwyd that the entirety of the Advance Payment had been consumed in the first eight months of the contract is the most credible account.
- 143.7. The Advance Payment had been entirely consumed and therefore was unavailable as funds to set off payment on unpaid IPCs.
144. I find therefore that IPCs 5-8 remain outstanding, and I declare that the Respondent is liable for a total of N\$2,000,000.

CONTRACTUAL ISSUE ON LIABILITY REGARDING TANK ROOM NO. 8

Introduction

145. In contrast to the previous section, this section is heavily dependent on the facts adduced by the Parties.
146. Although the Claimant was not entitled to undertake a variation without following the procedures contained within Clause 13 of the Contract, the Claimant was entitled to, and in effect required to, mitigate its loss and attempt to fulfil its general contractual duties upon the breach of contract by the Respondent, as Employer, and the Engineer. Both the Respondent and the Engineer, an employee of the Respondent, breached the Contract by engaging in acts of negligence and negligent performance of contractual duties between the start of work and the moment the Claimant, as Contractor, instructed its staff to engage in efforts to mitigate its loss from these breaches and fulfil its general contractual duties. This account provides a better explanation of the Claimant's response to events than those insinuated by the Respondent. The Claimant's response to events was reasonable in the circumstances, and on general principles the Respondent is liable for the costs of the Claimant's efforts at mitigation.

Variation Procedure

147. Clause 13 of the Contract provides for variation of the works of the contract.
- 147.1. Sub-Clause 13.1 provides the Engineer the right to initiate variations.

- 147.2. Sub-Clause 13.2 provides the Contractor the ability to propose Value Engineering Variations to the Engineer; this clause does not impose a duty on the Engineer to accept the proposal.
- 147.3. Sub-Clause 13.3 provides for a procedure by which variations would be adopted. This imposes rights and duties on both the Engineer and the Contractor.⁶
148. Sub-Clause 4.4 imposes a general duty of care upon the Engineer and the Parties when making determinations regarding variations and other matters; *“the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not reached, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. The Engineer shall give notice to both Parties of each determination. Each party shall give effect to each determination unless and until revised under clause 21 [Arbitration].”*
149. Immediately a tension within Sub-Clause 4.4 can be seen; even if the Engineer is in breach of its duty to make a fair determination, it does not appear that the duty of a party to give effect to that determination until arbitration revises it is suspended. However, the Respondent has not alleged that the Claimant has breached its duty under Sub-Clause 4.4 and does not in any other way rely upon it. Pursuant to Article 27(1) of the UNCITRAL Rules, the burden rests with the Respondent to prove facts to support its defence; the Respondent has not done this and I find this possible argument waived by the Respondent.

Negligence of Employer and Engineer

150. It is a cardinal principle of virtually all legal systems that a duty to execute contractual duties at a level of reasonable care and skill. This is found in both common law jurisdictions and in civil law jurisdictions, and although no authority as to the application of this principle in Northistan has been cited to me, I believe I am entitled to find that this in the present circumstances without offending principles of natural justice or the New York Convention.
151. Should a party be found to have performed its contractual duty negligently, that party will accordingly be found to have breached its contract.
152. On multiple occasions, both the Employer and the Engineer performed their contractual duties negligently. On several of these occasions, the negligence was so obvious as to appear imperceptible. The following record corrects that.

Failure by Employer to Produce Workable Building Plans, c. August 2020

153. On 1 July 2020, the Parties entered into the Contract and the Claimant duly mobilized over the following month. In its Particulars of Claim, the Claimant writes, *“However, the design for Tank Room 8 was a major problem. The original design had been changed to*

⁶ Sub-Clause 13.3 mistakenly refers to “Sub-Clause 3.5 [Determinations]”, when it should in fact refer to Sub-Clause 4.4. I hold Sub-Clause 13.3 rectified to remedy this.

include a stairway and mezzanine and because of these changes, the machinery designated for Tank Room 8 was not going to fit.”

154. At the Hearing, I inspected the artist’s impression; the machinery would indeed have to pass through the mezzanine and stairs and would be impossible to fit into the Employer’s design. I enquired as to the agreement of the Parties that this was the actual design of the Employer and that the me machinery was the assigned machinery. The Parties agreed it was.
155. Although not presented in the extracts from the Contract with which I have been presented, it is clear that the Respondent as Employer had the duty to produce plans for the project.
156. *Res ipsa loquitur* is a phrase that means “the thing speaks for itself”. If the plans produced by the Employer were physically impossible to build, I do not need to inquire into the mind of the Respondent to find negligence. Plans for works that are impossible simply demonstrate without more a lack of reasonable care and skill in their preparation.

Failure by Engineer to Address Concerns in Month 2, c. September 2020

157. Lesley Randal, Engineer for the Respondent, states, “*The Claimant told me that the designs for Tank Room 8 were wrong back in month 2.*” I interpret “Month 2” to mean September 2020, as the works commenced August 2020.
158. It is at this point that I am capable of peering into the mind of the Respondent, who was at this point at least constructively aware of the problems with Tank Room No. 8.
159. As the Respondent was under a continuing contractual duty to produce building plans capable of being built, the Respondent was in breach of contract when the Claimant made its concerns known.

Negligence and breach of contract under Sub-Clause 13.1

160. Sub-Clause 13.1 states, “*The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating that... (ii) it will reduce the safety or suitability of the Works. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.*”
161. By the Engineer’s testimony, it is clear that the Claimant gave notice to the Engineer.
162. First, it is clear that the Engineer executed its duty to “confirm” the instruction negligently, as the Engineer confirmed building plans that were incapable of being built.
163. Second, it is clear that this constitutes a Determination that the Engineer executed in breach of its duty to make a fair determination, taking due regard of all relevant circumstances, pursuant to Sub-Clause 4.4. The fact that the plans were incapable of being built indicates the Engineer did not take due regard.

Negligence and breach following 5 October 2020

164. By both the Claimant's Particulars of Claim and the Engineer's testimony, the Claimant repeated its concern to the Engineer on 5 October 2020.
165. There is a factual dispute as to what happened next. The Claimant states in its Particulars of Claim, "*The Engineer did not reply...*" whereas the Engineer states, "*it was 5th October, but the works were not even nearly to that stage at the time and we agreed to park the matter until the time came.*"
166. If the Engineer's account is taken as fact, general negligence and breach of Sub-Clause 4.4 are again found. Although the Claimant appears to agree to hold off enforcing this duty, no contractual right to withhold performance, estoppel or similar legal mechanism is pleaded.
167. If the Claimant's account is taken as fact, general negligence and breach of Sub-Clause 4.4 are again found, exacerbated by the Engineer's conscious, i.e., reckless, refusal to deal with the matter.

Value Engineering Variation Request and Response

168. On 8 October 2020, the Claimant submitted a Value Engineering Variation request pursuant to Sub-Clause 13.2. The Claimant stated it did this because it had not heard from the Engineer; the Engineer stated she was "*really confused*" because of her earlier understanding of things.
169. The Engineer claims that she "*took it to the Employer and explained the problem was probably very real but that we were not at the stage of building Tank Room 8 yet anyway.*"
170. Possibly concerning this two-day period, Marco Pryon states, "*We never said that the works to Tank Room 8 were unnecessary but the Claimant did not give us full opportunity to investigate and do a cost analysis....*"
171. On 10 October 2020, according to the Claimant, "*The Engineer replied on 10.10.20 saying that the Contractor was not responsible for design work and had to build as designed.*" Jacob Tarens confirmed this in his witness statement.
172. It is possible to evaluate the actions of the Engineer against contractual requirements.
- 172.1. Pursuant to Sub-Clause 13.3, it is true that the Engineer responded "*with approval, disapproval, or comments,*" albeit in a perfunctory manner.
- 172.2. Pursuant to Sub-Clause 4.4, the Engineer was under a duty to "*consult with each party in an endeavour to reach agreement.*" The Engineer did consult with the Respondent, but does not appear to have engaged the Claimant. Whether the Engineer endeavoured to reach agreement is ambiguous.
- 172.3. Pursuant to Sub-Clause 4.4, the Engineer was under a duty to "*make a fair determination in accordance with the Contract, taking due regard of all relevant*

circumstances.” Once again, the Engineer has failed to fulfil its duties under this clause. The plans remained impossible to build; instructing the Claimant to “*build as designed*” does not evince “*due regard*”. The Engineer cannot also be said to have exercised her duties with reasonable care and skill by endorsing plans that by their nature frustrate the Contract.

Late October 2020 Events

173. After this rejection, the Claimant and its representatives apparently made further attempts to deal with this problem, stating it had “*tried very hard to get the Engineer to come and see the room and the problem and to show him the work-around but he said he was too busy and refused to even discuss the problem.*”
174. This evinces further violation of the Engineer’s duties under Sub-Clause 4.4 and general principles.

Summary of Negligence and Negligent Breach of Contract

175. During the period between 1 July 2020 and 1 November 2020, the Employer and the Engineer engaged in a course of conduct that created the problems associated with Tank Room N. 8, prevented the Parties from sorting out the problems associated with Tank Room No. 8, and obfuscated and mischaracterized the problems associated with Tank Room No. 8.
176. During this time, the Claimant fulfilled its procedural obligations under Clause 13.

Claimant’s Actions Flow from Engineer’s Negligence

177. On 1 November 2020, the directors of the Claimant gave the ground team instruction to go ahead with the proposed changes to Tank Room No. 8.⁷
178. The Claimant was motivated by a desire to prevent delays to the Project and its performance of its obligations under the Contract. In the Particulars of Claim, the Claimant stated that it had explained to the Respondent that the changes “*had been made to prevent any delay in the project.*” In his witness statement, Mr Tarens states, “*They simply didn’t listen to us. Work was moving on and if we didn’t deal with Tank Room 8, we would have fallen behind schedule. We had no choice and got on with the work.*” In the Claimant’s oral submissions, it states, “*There was no other way of achieving the remit and any delay would have had a knock on effect of delaying other words in the project.*”
179. On 3 November 2020, the Claimant wrote to the Employer directly, who wrote back to say that the changes were unsolicited, that they should not have been undertaken without permission, and would not be compensated.
180. From the perspective of the Claimant, the Respondent and the Engineer engaged in a course of conduct that constituted breach of contract and, without modification, would frustrate the Contract. The Claimant had been given no assurances that at some later point,

⁷ This is contrary to the assertion by the Engineer that they had been done in the last two weeks in October 2020.